Supreme Court, U. S.
FILED
JUL 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-60

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. MCARTHUR,
Trustees of the Property of Penn Central Transportation Company,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Trustees of the Property of Penn Central Transportation Company,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, National Railroad Passenger Corporation ("Amtrak"), respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") to review the decision of that Court in Cause No. 76-1829. The decision of the Seventh Circuit is reported at 551 F.2d 127 (7th Cir. 1977), and is Appendix A, page 65.* The Seventh Circuit reversed the decision of the United States District Court

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* References to the Appendices attached hereto will be made by "App." followed by the page number.

for the Southern District of Indiana, Indianapolis Division, Chief Judge William E. Steckler, presiding ("Indiana court"), in Cause No. IP 76-274-C in favor of Amtrak and against the respondents, Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of Penn Central Transportation Company ("Penn Central" or "trustees"). The decision of the Indiana court, consisting of a Judgment Entry and a Memorandum Order, Findings of Fact and Conclusions of Law, is Appendix B, page 81. That decision is not reported.

JURISDICTION

On June 25, 1976, the Indiana court entered its decision in favor of Amtrak and against Penn Central. That decision was in the form of a declaratory judgment ("declaratory judgment") interpreting an earlier, nonappealed judgment by the same Indiana court confirming under the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, an arbitration award in favor of Amtrak and against Penn Central ("confirmation judgment"). The confirmation judgment was entered on March 24, 1976, and is Appendix C, page 89. The arbitration award (App. 91) is attached to the confirmation judgment.

On February 15, 1977, the Seventh Circuit rendered its decision, reversing the declaratory judgment of the Indiana court. The Seventh Circuit held that issues raised by Penn Central in proceedings before the United States District Court for the Eastern District of Pennsylvania (the court presiding over the Penn Central reorganization proceeding in Cause No. 70-347, hereafter the "reorganization court"), as a defense to the enforcement of the confirmation judgment, which issues could have been raised before the confirmation court but were not so raised, were not res judicata and not barred by the confirmation judgment and could be considered by the reorganization court. On March 3, 1977, and again on March 29, 1977, the Seventh Circuit

stayed the issuance of the mandate for a total of 90 days to permit Amtrak to file a petition for writ of certiorari. By Orders dated April 28, 1977, Justice Stevens extended Amtrak's time to file the petition to and including July 15, 1977, and stayed the mandate of the Seventh Circuit pending the timely filing by Amtrak of the petition. This Court has jurisdiction to review the decision of the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The basic issues here are ones of judicial power and competence and the authority and finality of judgments entered by one federal court under the Federal Arbitration Act and under the Declaratory Judgment Act as opposed to the asserted bankruptcy power of another federal court to entertain a direct attack upon the judgments of the first court. In addressing those basic issues, the Court will need to consider:

1. Did the Indiana court have jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, to declare the validity, finality and legal significance of its own prior confirmation judgment entered upon an arbitration award under the Federal Arbitration Act, 9 U.S.C. § 13, when Penn Central asserted that the confirmation judgment was invalid because of the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701, *et seq.* ("Rail Act") and sought an injunction against the execution or enforcement of that judgment?

2. By entering the declaratory judgment declaring the legal significance of the confirmation judgment, did the Indiana court interfere with the jurisdiction of the reorganization court? More specifically, can the reorganization court restrict by its prior order the scope and meaning given by Congress to a confirmation judgment under 9 U.S.C. § 13 by reserving to itself the authority to review

the validity and the effect of all proceedings before the Indiana court adjudicating the underlying liability of the trustees of the bankrupt estate? Would such reservation of authority permit Penn Central to elect not to raise issues (such as the Rail Act defense) before the Indiana court as to the validity and effect of the arbitration award, but to wait and raise such issues in proceedings before the reorganization court to enforce the confirmation judgment? Can the reorganization court refuse to honor, and in effect overrule, the decision of the Indiana court that issues which were not raised before the Indiana court, but which could have been raised, were res judicata as to the parties?

3. Assuming the Indiana court had the jurisdiction to enter a judgment under the Declaratory Judgment Act declaring the meaning of and legal rights arising out of its own prior confirmation judgment, was the declaration of the Indiana court legally correct that the confirmation judgment barred Penn Central's Rail Act defense? Can Amtrak be made to litigate the validity of the arbitration award in two forums—the confirming Indiana court and the reorganization court?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutes and constitutional provisions are involved in this case:

Federal Arbitration Act, 9 U.S.C. §§ 1-14, and particularly:

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. * * *" 9 U.S.C. § 9.
>
> "In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> "(a) Where the award was procured by corruption, fraud, or undue means.
>
> "(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> "(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> "(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> "(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its

discretion, direct a rehearing by the arbitrators." 9 U.S.C. § 10.

"The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

"(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

"(b) The award.

"(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

"The judgment shall be docketed as if it was rendered in an action.

"The judgment so entered shall have the same force and effect, in all respects as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13.

Section 77 of the Bankruptcy Act, 11 U.S.C. § 205, and particularly:

"(j) In addition to the provisions of section 29 of this title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: *Provided*, That suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction

and any order staying the prosecution of any such cause of action or appeal shall be vacated. • • •" 11 U.S.C. § 205(j).

28 U.S.C. § 959(a):

"Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury."

Federal Declaratory Judgment Act:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201.

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

Rail Passenger Service Act, 45 U.S.C. §§ 501-645 ("Amtrak Act"), and particularly:

"(a)(1) On or before May 1, 1971, the Corporation [Amtrak] is authorized to contract and, upon written request therefor from a railroad, shall tender a contract to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service. On or after March 1, 1973, but before January 1,

1975, the Corporation is authorized to contract, and upon written request therefor, shall tender a contract to relieve the railroad of its entire responsibility for the provision of intercity rail passenger service and such relief shall become effective upon the date on which such contract is entered into. Contracts may be entered into on or before May 1, 1971, notwithstanding the fact that the decision of the Commission under section 502(6) of this title with respect to avoidable loss has not become final. Any contract entered into before such decision of the Commission has become final shall be subject to adjustment to assure that the contract is consistent with such final decision of the Commission. The contract may be made upon such terms and conditions as necessary to permit the Corporation to undertake passenger service on a timely basis. Upon its entering into a valid contract (including protective arrangements for employees), the railroad shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under part I of the Interstate Commerce Act or any State or other law relating to the provision of intercity passenger service: *Provided,* That any railroad discontinuing a train hereunder must give notice in accordance with the notice procedures contained in section 13a(1) of Title 49." 45 U.S.C. § 561(a)(1).

"(a) The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree. * * *" 45 U.S.C. § 562(a).

Regional Rail Reorganization Act of 1973 ("Rail Act"), 45 U.S.C. §§ 701-794, and particularly:

"The Corporation [ConRail] shall have all of the powers and is subject to all of the duties vested in it under this chapter, in addition to the powers conferred upon it under the laws of the State or States in which it is incorporated and the powers

of a railroad in any State in which it operates. The Corporation is authorized and directed to—

"(a) acquire rail properties designated in the final system plan to be transferred or conveyed to it;

"(b) operate rail service over such rail properties except as provided under sections 744(e) and 791(d)(3) of this title;

"(c) rehabilitate, improve, and modernize such rail properties; and

"(d) maintain adequate and efficient rail services.

"So long as 50 per centum or more, as determined by the Secretary of the Treasury, of the outstanding indebtedness of the Corporation consists of obligations of the Association or other debts owing to or guaranteed by the United States, the Corporation shall not engage in activities which are not related to transportation." 45 U.S.C. § 742.

"(a) *Deposit with court.*—Within 10 days after delivery of a certified copy of a final system plan pursuant to section 719(c) of this title—

"(1) the Corporation, in exchange for the rail properties of the railroads in reorganization in the region and of railroads leased, operated, or controlled by railroads in reorganization in the region to be transferred to the Corporation, shall deposit with the special court all of the stock and other securities of the Corporation and obligations of the Association designated in the final system plan to be exchanged for such rail properties;

"(2) each profitable railroad operating in the region purchasing rail properties from a railroad in reorganization in the region, or from a railroad leased, operated, or controlled by a railroad in reorganization in the region, as provided in the final system plan shall deposit with the special court the compensation to be paid for such rail properties.

"(b) *Conveyance of rail properties.*—(1) The special court shall, within 10 days after deposit

under subsection (a) of this section of the securities of the Corporation, obligations of the Association, and compensation from the profitable railroads operating in the region, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation and the respective profitable railroads operating in the region, all right, title, and interest in the rail properties of such railroad in reorganization and shall itself order the conveyance of all right, title, and interest in the rail properties of any railroad leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan as certified to such court under section 719(d) of this title.

"(2) All rail properties conveyed to the Corporation and the respective profitable railroads operating in the region under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided on January 2, 1974, for the continuance of rail passenger service or any lien or encumbrance of no greater than 5 years' duration which is necessary for the contractual performance by any person of duties related to public health or sanitation. Such conveyances shall not be restrained or enjoined by any court.

"(3) Notwithstanding anything to the contrary contained in this Act, if railroad rolling stock is included in the rail properties to be conveyed, such conveyance may only be effected if the profitable railroad operating in the region or the Corporation to whom the conveyance is made assumes all of the obligations under any conditional sale agreement, equipment trust agreement, or lease in respect to such rolling stock and such conveyance is made

subject thereto; and the provisions of this chapter shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendee or assignee under such conditional sale agreement, equipment trust agreement or lease under section 205(j) of Title 11." 45 U.S.C. § 743(a) and (b).

United States Constitution, Art. I, § 8:

"Section 8. The congress shall have power • • •

"• • •

"To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

"• • •

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

United States Constitution, Art. III, §§ 1 and 2:

"Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

"Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citi-

zens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed."

STATEMENT OF THE CASE

This case involves legal issues having significant implications for the future of Amtrak and the operation of intercity rail passenger service in the United States and for the proper interpretation of the Declaratory Judgment Act, the Federal Arbitration Act, the Bankruptcy Act and the Rail Act. At the heart of the controversy between Amtrak and Penn Central lie the critical issues of (1) what the proper role of a federal bankruptcy reorganization court is *after* allowing its bankruptcy trustees to enter into an agreement having a broad arbitration clause, *after* allowing its trustees to participate in arbitration proceedings leading to an award conclusively establishing that the trustees breached their agreement, *after* allowing its trustees to participate in confirmation proceedings and to consent to the confirmation of the arbitration award against the trustees by a judgment of a coordinate federal district court, and *after* allowing its trustees to participate in (and lose) a declaratory judgment action in a coordinate

federal district court concerning the final confirmation judgment; and (2) how far a reorganization court can go in reviewing, vacating and setting aside final judgments of a coordinate federal district court entered in proceedings under the Federal Arbitration Act. This is a case in which the Seventh Circuit has in effect sanctioned a significant intrusion of one federal court into the statutory and constitutional powers of another federal court. Amtrak asks this Court to grant the petition for writ of certiorari so that the line between the powers of sister federal courts can be made clear.

Summary of Facts. The procedures in this case and related cases are somewhat complex, but have become so solely because of the refusal of Penn Central, the reorganization court, and to some extent the Seventh Circuit to honor a final, unappealed judgment entered by Chief Judge Steckler of the Indiana court. Much has happened since 1971, when the federal district court in Philadelphia then having railroad reorganization responsibility for the affairs of Penn Central under section 77 of the Bankruptcy Act, 11 U.S.C. § 205, authorized Penn Central to enter into two contracts with Amtrak; namely, The National Railroad Passenger Corporation Agreement ("Basic Agreement") and The National Railroad Passenger Corporation Arbitration Agreement ("Arbitration Agreement"). For the Court to understand fully the legal significance of the decision of the Seventh Circuit which Amtrak asks this Court to review, Amtrak in the following pages will describe in chronological order what has transpired in the four federal courts which have dealt with the controversy. At the outset, however, it may be helpful for the Court to keep several key facts in mind about which there is no dispute—facts that hopefully will serve as signposts along the treacherous path mapped by Penn Central which Amtrak believes led the Seventh Circuit into error.

Fact 1. The federal reorganization court in Philadelphia permitted Penn Central, in order to be relieved of its obligations to operate intercity rail passenger service and to escape the large financial losses involved in continuing to operate such service, to execute the statutory Basic Agreement with Amtrak, dated as of April 16, 1971, and effective May 1, 1971. The Basic Agreement, under which each railroad contracting with Amtrak agreed to furnish the necessary services to run Amtrak trains on schedule over the railroad's tracks, provided that Penn Central and all of the other railroads entering into similar Basic Agreements with Amtrak would also enter into an Arbitration Agreement under which the parties agreed to submit their disputes under the Basic Agreement to binding arbitration.

Fact 2. Penn Central breached the statutory Basic Agreement by failing to maintain approximately 360 miles of tracks between Chicago and Louisville and Chicago and Cincinnati at the heart of the Amtrak system in the Midwest at the level of utility required by the Basic Agreement. As a result of this breach by Penn Central of its obligation, Amtrak has not been able to use the tracks since August 2, 1974, and since that date, the Midwest has been deprived of the rail passenger service which Congress in the Amtrak Act directed Amtrak to provide.

Fact 3. The National Arbitration Panel issued its award in favor of Amtrak on February 3, 1976, requiring Penn Central to "institute, or cause to be instituted" a program to restore the tracks at no cost to Amtrak and thus to return the required rail passenger service to the Midwest.

Fact 4. On February 4, 1976, Amtrak invoked the jurisdiction of the federal Indiana court to confirm the award under 9 U.S.C. § 9, section 4.3 of the Arbitration

Agreement and 28 U.S.C. § 959, and asked the Indiana court to enter its judgment upon the award under 9 U.S.C. § 13. Penn Central asked the reorganization court in Philadelphia to enjoin the confirmation proceedings before the Indiana court. After holding a hearing, the reorganization court declined to enter any such injunction and the confirmation proceedings continued. On March 24, 1976, the Indiana court entered judgment against Penn Central confirming the arbitration award under 9 U.S.C. § 13. Penn Central did not object; in fact, Penn Central *consented* to the entry of judgment by the Indiana court under 9 U.S.C. § 13 without condition. Moreover, Penn Central *did not appeal.*

Fact 5. On April 1, 1976, the 360 miles of tracks were conveyed by Penn Central to Consolidated Rail Corporation ("ConRail") pursuant to the Rail Act, a conveyance that had been contemplated and understood for some time by the parties, by the National Arbitration Panel, by the Indiana court and by the reorganization court. On that date (after the confirmation judgment, but prior to the declaratory judgment), the constructive possession of the reorganization court over the conveyed properties was removed.

Fact 6. On April 9, 1976, Amtrak asked the reorganization court to direct, instruct and authorize Penn Central to comply with the Indiana court's confirmation judgment. Penn Central responded with the defense that the conveyance of the 360 miles of tracks to ConRail pursuant to the Rail Act excused any obligation of Penn Central to comply with the Indiana court's confirmation judgment. Indeed, Penn Central asked the reorganization court to enjoin Amtrak from seeking execution or enforcement of its rights under the confirmation judgment.

Fact 7. Amtrak believed that the Rail Act issue, like all other legal defenses to the validity of the arbi-

tration award and Penn Central's underlying liability, had already been resolved by the confirmation judgment of the Indiana court, and that Penn Central's response in the reorganization court was a direct attack upon the confirmation judgment and the power of the Indiana court under 9 U.S.C. § 13. Therefore, on May 5, 1976, Amtrak filed its declaratory judgment complaint in the Indiana court, the court that had issued the confirmation judgment in the first place, asking the court to declare the legal effect and validity of that prior judgment—specifically, whether Penn Central was foreclosed from raising the Rail Act defense after the confirmation judgment was entered rather than before. On June 25, 1976, after the parties were fully heard, the Indiana court entered its declaratory judgment in favor of Amtrak and against Penn Central. Penn Central appealed to the Seventh Circuit and also obtained an injunction from the reorganization court against Amtrak from proceeding anywhere.

Fact 8. On September 30, 1976, in a related development, the reorganization court denied Amtrak's petition to direct, instruct and authorize Penn Central to comply with the confirmation judgment, saying that the Rail Act and the conveyance of the tracks to ConRail, in effect, relieved Penn Central of all responsibility for its defaults under the Basic Agreement, even though the defaults occurred before the conveyance to ConRail. The reorganization court's decision, Order No. 2569, is reported at 422 F.Supp. 67 (E.D. Pa. 1976) and is Appendix D, page 109. That decision is now pending on appeal to the United States Court of Appeals for the Third Circuit, where oral arguments were heard on April 1, 1977.

Fact 9. On February 15, 1977, the Seventh Circuit below vacated the decision of the Indiana court, saying

that that court had exceeded its powers in entering the declaratory judgment.

The effect of the decision of the Seventh Circuit is that it was for the reorganization court to decide the issue of whether the Rail Act was a bar to the enforcement of the arbitration award, notwithstanding the fact that this issue could have been raised before the Indiana court in the confirmation proceedings and determined by that court. The question here is whether the declaratory judgment of the Indiana court is to be given effect, a judgment making it crystal clear that the Indiana court's confirmation judgment had already adjudicated against Penn Central its "defense" raised in the reorganization court that because of the Rail Act, the arbitrators lacked power to compel Penn Central to pay for the track restoration. Does the reorganization court have the right to reconsider the underlying merits of the confirmation judgment? When all is said and done, can Amtrak's rights under a final judgment of a United States district court mean nothing? Did Congress intend for the power of one district court to enter a judgment to be circumscribed by the power of another district court? Is that consistent with Article III of the United States Constitution?

Fact 1. Background and the Contractual Relationship Between Amtrak and Penn Central

Amtrak is a for-profit corporation created by the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501, *et seq.* ("Amtrak Act"). The Act is Congress's effort to save the nation's rail passenger transportation system from demise. The declared purpose of Amtrak is set out in section 101 of the Amtrak Act, 45 U.S.C. § 501; namely, "providing modern, efficient, intercity rail passenger service." Amtrak was granted the right initially to operate intercity rail passenger service throughout the United States within a "basic system" designed by the Secretary

of Transportation in accordance with the mandates of section 201 of the Amtrak Act, 45 U.S.C. § 521. Under the Amtrak Act, Penn Central and any other railroad that wished to be relieved of the responsibility for the provision of unprofitable intercity rail passenger service was required to enter into a contract with Amtrak or in the alternative to continue to operate its own passenger trains within the basic system. 45 U.S.C. § 561. Congress had directed Amtrak to commence services on May 1, 1971, 45 U.S.C. § 561(b), and, to do that, had authorized Amtrak to "contract with railroads * * * for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree." 45 U.S.C. § 562(a). For those who elected to contract with Amtrak, Congress said in section 306(e) of the Amtrak Act, 45 U.S.C. § 546(e):

> "(e) Persons contracting with the Corporation for the joint use or operation of such facilities and equipment as may be necessary for the provision of efficient and expeditious passenger service shall be and are hereby relieved from all prohibitions of existing law, including the antitrust laws of the United States, with respect to such contracts, agreements, or leases insofar as may be necessary to enable them to enter into such contracts and to perform their obligations thereunder."

Penn Central elected to contract with Amtrak. The federal reorganization court in Philadelphia, by Order No. 238, dated April 27, 1971, authorized Penn Central to execute the statutory Basic Agreement[1] and Arbitration Agreement and to comply with all provisions thereof, with the unilateral caveat, not agreed to by Amtrack, "that whenever any matter is resolved by arbitration pursuant to the Main [Basic] Agreement or the Arbitration Agreement, the

[1] The reorganization court found that the Amtrak contract would have a positive cash flow to the Penn Central estate of at least $267 million over a seven-year period and that "the alternatives to approval of the proposed contract are quite bleak."

decision shall be submitted to this Court for review and approval before becoming finally binding upon the Trustees or the Debtor, during the pendency of these reorganization proceedings."[2] The Basic Agreement and the Arbitration Agreement between Amtrak and Penn Central dated as of April 16, 1971, and effective May 1, 1971, are identical to contracts entered into by Amtrak with nineteen other railroads to accomplish the goal of a national network of interconnecting rail lines providing an alternative mode of intercity passenger transportation. The terms of the two agreements were the outcome of negotiations between Amtrak and a committee of the Association of American Railroads, chaired by a representative of the Penn Central trustees. Under the Basic Agreement and the Arbitration Agreement, Amtrak undertook to assume the intercity rail passenger responsibilities of Penn Central and the other contracting railroads, and in return, Penn Central and the other railroads undertook to render certain services to Amtrak and, among other things, to maintain the rail lines "at not less than the level of utility" existing on May 1, 1971. Section 4.2 of the Basic Agreement.

[2] As explained in part 2 of the Reasons for Granting the Writ below, Amtrak believes that the reservation by the reorganization court of the right of "review and approval" merely expressed the inherent power of that court to fit into the overall administration of the bankrupt estate obligations of the trustees adjudicated elsewhere. It was not a reservation of the right to re-adjudicate causes of action against the trustees litigated to final judgment elsewhere. A bankruptcy court does not have power to do that. In other words, a bankruptcy court can decide how and when a judgment against the trustees is to be paid; it may not re-adjudicate the question whether the trustees were liable in the first place. Amtrak's attorneys had put the reorganization court on notice in 1971, after Penn Central had executed the contracts and Amtrak was first informed of Order No. 238, that any blanket assertion that Order No. 238 wiped out the meaning and effect of binding arbitration would be contested. Between 1974 and 1975, five arbitration cases were brought before the reorganization court and never before this case has that court asserted that it had an exclusive right to review the merits of arbitration awards. The reorganization court has withheld decision on the earlier cases, and Order No. 2569, discussed below, is the first time the reorganization court has invoked Order No. 238 to invalidate an admittedly valid award and confirmation judgment of a sister federal court.

Of critical importance to the accomplishment of Congress's goal of saving rail passenger service and of providing a restructured rail passenger system was the settlement of all disputes by binding arbitration. Article Six of the Basic Agreement states in relevant part as follows:

> "* * * [A]ny claim or controversy between NRPC [Amtrak] and Railroad [Penn Central] concerning the interpretation, application, or implementation of this Agreement shall be submitted to *binding* arbitration in accordance with the provisions of the Arbitration Agreement dated the date hereof among NRPC, Railroad, and certain other railroads * * *." (Emphasis added).

Section 4.2 of the Arbitration Agreement provides:

> "* * * [A]ny arbitration award hereunder made by a *majority* of the members of any Arbitration Panel *shall be binding* upon the parties thereto. Any arbitration award hereunder shall declare the rights of the parties thereto and *may make awards of money or, enjoin or otherwise operate in such a way as to require specific performance by a party of any act or obligation.*" (Emphasis added).

And section 4.3 of the Arbitration Agreement provides:

> "Judgment may be entered upon an arbitration award hereunder * * * in *any* United States District Court." (Emphasis added).

Fact 2. Penn Central Breached The Agreement

Among the rail lines which Penn Central agreed to maintain at the May 1, 1971, level of utility were approximately 360 miles of tracks traversing the State of Indiana and connecting Chicago with Cincinnati and Louisville via Indianapolis.[3] By late summer of 1972, when Amtrak first

[3] These are key lines in the Congressional program under the Amtrak Act. Two routes are involved, both part of the basic system of interconnecting passenger routes designed by the Secretary of Transportation and enacted into law. One route connected Chicago and Washington via Indianapolis and Cincinnati and was used by Amtrak's eastbound train "The George Washington" and by Amtrak's westbound train "The James Whitcomb Riley." The other route connected Chicago with St. Petersburg via Indianapolis and Louisville and was used by Amtrak's northbound and southbound trains both known as "The Floridian." By August 1, 1974, the tracks owned by Penn Central along the two routes had been allowed to deteriorate to a point where they could not be used for passenger trains. The end result—compounded by Penn Central's delays in failing to maintain and restore the rails as promised and as ordered to do—has substantially interfered with the Congressional plan for rapid, safe intercity rail passenger service.

began arbitration proceedings against Penn Central,[4] it was clear that Penn Central was starting to abandon the rail lines through neglect, making them unfit for passenger train usage in violation of the Basic Agreement. On August 2, 1974, the Federal Railroad Administration condemned the rail lines as unsafe, and all passenger service over the lines ceased. While as a result of protracted litigation, Amtrak was able to use as a substitute the freight tracks of The Chesapeake and Ohio Railway Company ("C & O"),[5] connecting Chicago with Cincinnati, the C & O tracks do not serve the capital of Indiana, Indianapolis, do not go to Louisville and are largely unsuitable for the efficient, rapid rail passenger service contemplated by Congress.

[4] The arbitration proceedings were initiated by Amtrak before the National Arbitration Panel, *not* before the reorganization court as stated at one place in the decision of the Seventh Circuit (App. 67). The arbitration proceedings between Amtrak and Penn Central were consolidated with like proceedings brought by Amtrak against Illinois Central Gulf Railroad ("ICG"). An award was rendered against ICG requiring it to restore over 1,000 miles of tracks, which ICG is now in the process of doing.

[5] The status of the C & O litigation is best described by the decision of the Seventh Circuit in Amtrak's favor in Cause No. 76-1472 issued on March 4, 1977, which is reported at 551 F.2d 136 (7th Cir. 1977) and which is Appendix E, page 123. The C & O arbitration confirmation proceedings and the Penn Central arbitration confirmation proceedings were consolidated by the Indiana court and the two confirmation judgments, one against Penn Central and one against C & O, were issued in Amtrak's favor at the same time by the Indiana court. C & O's appeal of the confirmation judgment against C & O and Penn Central's appeal of the later declaratory judgment interpreting the confirmation judgment against Penn Central were considered together by the Seventh Circuit. The Seventh Circuit affirmed the C & O confirmation judgment and reversed the Penn Central declaratory judgment.

Everyone—Amtrak, Penn Central, the National Arbitration Panel, the Indiana court, the reorganization court and the Seventh Circuit—agrees that between 1971 and 1976, Penn Central breached the Basic Agreement with Amtrak and that the Midwest has been deprived of certain rail passenger service since August 2, 1974.

Fact 3. The Arbitration Award of the National Arbitration Panel

After extensive arbitration proceedings between Amtrak and Penn Central spanning well over three years and costing hundreds of thousands of dollars, the National Arbitration Panel, the body designated in the Arbitration Agreement to hear and determine all disputes between Amtrak and the 20 contracting railroads, issued its award on February 3, 1976. That arbitration award is attached to the Indiana court's confirmation judgment and is reproduced in Appendix C (App. 91).

The arbitration award declared that Amtrak had a contract right to have the delapidated Penn Central tracks kept at the May 1, 1971, level of utility under section 4.2 of the Basic Agreement. It held that Penn Central had breached that duty by failing to keep the lines in the agreed-upon state of repair and has consciously permitted the tracks to so deteriorate through neglect that passenger trains could no longer safely use them. The arbitration award directed Penn Central, without cost to Amtrak, "to institute, *or cause to be instituted*" (App. 97-98) the restoration work on the tracks delineated in the detailed Panel Program attached to the arbitration award. The Panel Program also provided for a work schedule to be submitted to Amtrak within 90 days of the issuance of the arbitration award. The estimates of the cost of the repairs ranged from $22,000,000, based upon independent evaluation, to $11,000,000, estimated by Penn Central using its own employees.

Fact 4. The Confirmation Judgment

On February 4, 1976, Amtrak filed in the Indiana court a petition to confirm the arbitration award pursuant to 9 U.S.C. § 9, section 4.3 of the Arbitration Agreement, and 28 U.S.C. § 959. However, on February 17, 1976, Penn Central petitioned the reorganization court to stop the confirmation proceedings. A show-cause hearing on Penn Central's petition was held before the reorganization court on March 18, 1976. At that hearing, Amtrak made clear that it recognized the jurisdiction of the reorganization court to determine how and when payments from the assets of the Penn Central estate would be made to enforce, satisfy, and execute the arbitration award, if confirmed by judgment of the Indiana court. What Amtrak also made clear was its position that the Indiana court, not the reorganization court, had the power to decide any defenses Penn Central had to the validity of the arbitration award under the Rail Act. The following record was made at the March 18, 1976, hearing before the reorganization court, a copy of which record was submitted to the Indiana court by Amtrak as an exhibit in the later declaratory judgment action:

> "THE COURT: Let's assume the decision [of the arbitrators] is affirmed. As a decision ordering specific performance, I assume that is under equitable jurisdiction, and the failure to comply with the decree would give rise to contempt proceedings. Is that your position?
>
> "MR. VALENTINE [Counsel for Amtrak]: Your Honor, our position would be this: That the judge in Indiana is well aware of your Order 238, that after we received the confirmation, which is to say the finding that this is a valid award and that it is res judicata insofar as the interpretation of the contract, the fact that the panel did have the right to issue the specific performance award, the fact that there are no grounds under Section 10 of the Arbitration Act to vacate the award, that all is res judicata.

"We would then bring this case back to this [reorganization] court for surely no other court but yourself will be able to assign the assets of the estate to accomplish the specific performance award, and we think that that is very proper that we should bring it back here."

• • •

"THE COURT: You miss the point.

"As I understand it, your arbitration award does not award damages for past breaches. It orders specific performance for future correction. It obviously can't take effect until after conveyance date [of the rail lines to ConRail under the Rail Act], and at that point the whole ballgame has changed.

"Now what is your response to that?

"MR. VALENTINE: My response to that is that is a proper question for the judge in Indiana, and he is equally able to decide that question as this court • • •.

• • •

"Now, Your Honor, the point is that this is a past breach that we are trying to rectify, not a future obligation. The future obligation is quite different.

"The condition of the tracks now in this particular State of Indiana are depriving the state and its citizens of Indianapolis of railroad service that they are intended to have under the Amtrak Act. My point is that these people have been deprived of this now for some two or three years.

"Now that is because the trustees through a calculated policy neglected to perform the necessary maintenance to maintain these lines. That is a past breach.

"THE COURT: That is ridiculous; to accuse them of a calculated policy of not having enough money to do everything that had to be done is just idiotic. The fact is they were operating at a tremendous loss during an extensive period, as mandated by the federal government in order to permit reorganization under the RRRA [the Rail Act].

"Obviously, they would have been out of the railroad business years before had it not been for the RRRA, and to say you can just proceed with this litigation in Indiana as if there had not been a RRRA is just to —

"MR. VALENTINE: No, Your Honor, we don't take that position at all, sir. We say we are proceeding in Indiana in the face of the RRRA, and we say this is an Act which should be properly brought to the attention of the court of Indiana, which is proceeding with the original jurisdiction in this case. He has the original jurisdiction, in our view, and he has the right to proceed."

The reorganization court *never enjoined* the confirmation proceedings before the Indiana court. Moreover, Penn Central subsequently *consented* to the entry of the confirmation judgment on the arbitration award in favor of Amtrak, and, for whatever reason, Penn Central did not press the Rail Act defense, even though Penn Central had argued at every step of the arbitration proceedings and even to the Indiana court at a preliminary hearing on February 10, 1976, that the award was possibly invalid because of the Rail Act. On March 24, 1976, the Indiana court entered the confirmation judgment against Penn Central and in favor of Amtrak under 9 U.S.C. § 13. That judgment was not appealed by Penn Central and it is now final.

Fact 5. The Rail Act and the April 1, 1976, Conveyance to ConRail

While the arbitration proceedings between Amtrak and Penn Central were going on, Congress supplemented section 77 of the Bankruptcy Act with the Rail Act of 1973.[6] Under the Rail Act, there was to be a reduction in the number of freight routes serving the public according to

[6] For a description of the Rail Act and its relevance to Penn Central's bankruptcy, *see* the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335 (1974).

a Final System Plan designed by a federal agency, the United States Railway Association. On July 26, 1975, the Final System Plan was promulgated and the rail lines at issue here were designated for transfer to ConRail, the new corporation to take over the rail lines of seven major railroads, including Penn Central.

The arbitrators of the National Arbitration Panel were fully aware of the Rail Act. However, the majority of the arbitrators did not consider the Panel the proper body "to decide whether, or to what extent the [Rail Act] or the Final System Plan thereunder may affect the carrying out of this award." (App. 99). The dissenting arbitrator strongly disagreed and wrote a lengthy dissent which obviously made a complete record of his disagreement for the Indiana court faced with Amtrak's petition to confirm the award.[7]

On April 1, 1976, the conveyance to ConRail occurred and the section 77 jurisdiction of the reorganization court to administer the operation of Penn Central's property was removed. However, the reorganization court retains jurisdiction over the remaining assets and nonrailroad properties of Penn Central, as well as over the substantial proceeds to be received by the estate pursuant to the reorganization under the Rail Act. The Rail Act and the transfer to ConRail were the result of the realization by Penn Central, by the reorganization court and finally by

[7] The dissenting arbitrator thought it was a "dereliction in the discharge of [the Panel's] arbitration duties" to refrain from passing upon the impact of the Rail Act, thus leaving the matter to the courts (App. 107). The dissent says that "the majority appears to have adopted the contention of Amtrak counsel: 'On the other hand, if the Penn Central is lawfully entitled to relief from their contract obligations freely undertaken on April 16, 1971, then it can surely find adequate relief in the courts from any award this Panel might grant. Thus, if the Panel has no power to issue the specific performance herein requested, an adequate remedy is available to the Penn Central to protect itself from injury. The Award can be appropriately attacked under the provisions of the Federal Arbitration Act for vacating an improper award.' (Amtrak letter Dec. 23, 1975, to Panel Chairman)." (App. 101-102).

Congress that Penn Central could not be reorganized on an income basis under section 77.

Fact 6. Amtrak's Petition to the Reorganization Court and Penn Central's Answer

When Penn Central did not take immediate steps to comply with the confirmation judgment by instituting proper procedures for review and approval by the reorganization court in compliance with Order No. 238, Amtrak itself petitioned the reorganization court for an order to "direct, instruct, and authorize" Penn Central to comply with the confirmation judgment. Instead of joining with Amtrak to carry out the mandate of a federal court, Penn Central responded with an answer that the conveyance of the rail lines to ConRail pursuant to the Rail Act had made the confirmation judgment nonenforceable and asked the reorganization court to enjoin Amtrak from seeking "execution or enforcement" of the arbitration award in light of that "new matter."

At this point a new controversy arose between the parties over the ambiguity in and meaning of the confirmation judgment. Amtrak claimed the validity of the award, even in the face of the Rail Act and the property transfer to ConRail, had already been litigated in the recently completed confirmation proceedings before the Indiana court. Penn Central claimed it had not been, since the effect of the Rail Act on the arbitration award was not an issue there. Amtrak claimed that by these assertions Penn Central was directly attacking the original jurisdiction of the Indiana court to enter its judgment upon the award as prescribed by the Federal Arbitration Act and was treating the judgment of the Indiana court as if it were a nullity and not a final judgment on the merits.

Fact 7. The Declaratory Judgment Action

To settle the new controversy and dispute between Penn Central and Amtrak over the ambiguity in and the meaning of the confirmation judgment under the Federal Arbitration Act, the Bankruptcy Act and the Rail Act, Amtrak returned to Indiana. Amtrak's feeling then was and now is that there is no court better able to say what a judgment means than the court that rendered the judgment in the first place. On May 5, 1976, Amtrak filed a complaint for a declaratory judgment in order to determine the nature and scope of the legal rights which flowed from the confirmation judgment in the context of the judicial powers and jurisdiction of the Indiana court to hear and decide the legal validity of the arbitration award under sections 9 and 10 of the Federal Arbitration Act, 9 U.S.C. §§ 9-10. Jurisdiction was based upon 28 U.S.C. §§ 2201-2202, alleging both diversity of citizenship and federal question jurisdiction. Penn Central contested the jurisdiction of the Indiana court to enter a declaratory judgment and claimed that the Indiana court never had any judicial power in the confirmation proceedings to pass upon the consequences of the Rail Act or the lawfulness of the arbitration award.

A motion for summary judgment was made by Amtrak since there were no genuine issues of material fact. Penn Central moved to dismiss, asserting numerous legal arguments, and later moved for summary judgment, agreeing with Amtrak that there were no genuine issues of material fact. Briefs were submitted, and both parties were fully heard on the merits in oral argument. Penn Central litigated and lost, *without interference by the reorganization court*. Judgment was entered on June 25, 1976, in favor of Amtrak and against Penn Central. The Indiana court held it had jurisdiction to hear and decide the case before it and that the Rail Act defense which had been raised by Penn Central in its answer in the reorganization court raised issues which had already been, or ought to have

been, litigated in Indiana. The declaratory judgment provided (App. 86-87) that the earlier confirmation judgment upon the arbitration award was:

> "* * * a conclusive bar against any further legal claims which may be made by the Trustees that: (a) the award of the National Arbitration Panel and the judgment of this court is invalid or nonenforceable because of the Regional Rail Reorganization Act of 1973 * * *."

Within five days after the declaratory judgment had been entered against it, Penn Central made an *ex parte* motion to the reorganization court asking that court to enjoin Amtrak from further appearing in the Indiana court and to set down for immediate disposition Amtrak's earlier petition that Penn Central be directed to comply with the confirmation judgment and Penn Central's defense thereto that the Rail Act made the award nonenforceable. The injunction was granted,[8] and Amtrak was compelled to

[8] Order No. 2419 of the reorganization court, dated June 30, 1976, enjoined Amtrak from appearing in any other court to defend the validity and enforceability of the arbitration award pending "hearing of and decision of" this question by the reorganization court. On July 2, 1976, Penn Central filed post-judgment motions in the Indiana court for a stay of the enforcement of the declaratory judgment pending appeal and for an amendment to the declaratory judgment. On July 6, 1976, Amtrak was served with a copy of Order No. 2419, and thus was advised for the first time to appear before the reorganization court on July 15, 1976 (later continued to July 30, 1976), or be forever enjoined from enforcing the judgment of the Indiana court or the arbitration award. This led in turn to a number of procedures. Under Order No. 2419 Amtrak's attorneys were forbidden to defend against the post-judgment motions of Penn Central or to file briefs supporting the validity of the confirmation judgment against Penn Central which, apparently mistakenly, had been appealed by C & O to the Seventh Circuit. Believing Order No. 2419 was an unlawful exercise of section 77 reorganization court power and was an attempt by the reorganization court to seize the jurisdiction of the Indiana court, Amtrak asked the reorganization court for a stay of the scheduled proceedings in the reorganization court pending an appeal of Order No. 2419, an appeal which was filed with the Third Circuit on July 9, 1976. When no action was taken on this request, Amtrak made an emergency motion to the Third Circuit for a stay and an expedited hearing on the appeal of Order No. 2419. The reorganization court then issued Order No. 2458 explaining it had no intention to interfere with

appear before the reorganization court upon questions which Amtrak believes were finally decided in the Indiana court by the entry of the confirmation judgment; namely, whether Penn Central was liable for its past contract defaults and whether the rail line restoration order of the arbitrators was a valid arbitration award, notwithstanding the operation of the Rail Act.

Fact 8. The Decision of the Reorganization Court

After a hearing, the reorganization court on September 30, 1976, found itself "unable to agree" with the declaratory judgment of the Indiana court, believing the Indiana court had resolved the Rail Act defense of Penn Central by "procedural sleight-of-hand." (App. 118-19) The reorganization court concluded in Order No. 2569 that the Rail Act excused Penn Central from any obligation to comply with the confirmed arbitration award. It denied Amtrak's petition for satisfaction of its rights under the Indiana court's judgments. In short, the confirmation judgment and the declaratory judgment of the Indiana court were reviewed by the reorganization court and declared nullities. An appeal to the Third Circuit, Cause No. 76-2542, was perfected by Amtrak. The issues are fully briefed and oral argument was heard on April 1, 1977. There has been no decision.

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the appeal in the Seventh Circuit. However, the blanket injunction remained in effect pending hearing in the reorganization court on the merits of the Rail Act defense to the validity of the arbitration award. When on the day preceding the scheduled hearing in the reorganization court no decision had been made by the Third Circuit on the emergency motion, Justice Brennan of this Court in No. A-80 did grant a stay on July 29, 1976, which he later vacated. However, in the interim the post-judgment motions of Penn Central in the Indiana court had been denied *sua sponte* and C & O's appeal of the confirmation judgment in the Seventh Circuit was dismissed. The reorganization court then reset the hearing for September 8, 1976, continuing the injunction against Amtrak "until decision." On September 30, 1976, the reorganization court issued its decision against Amtrak (App. 109).

Fact 9. The Decision of the Seventh Circuit

On February 15, 1977, the Seventh Circuit issued its decision in favor of Penn Central and against Amtrak, thus reversing and vacating the Indiana court's declaratory judgment and holding it was appropriate only for the reorganization court (not the Indiana court) to determine the effect of the Rail Act on the enforceability of the confirmation judgment.

The Seventh Circuit said first that the Indiana court was "without jurisdiction by declaratory judgment, or other judicial means, to circumscribe the jurisdiction of the [reorganization court] as to the enforcement of an arbitration award which was subsequently confirmed by the Indiana Court, and we now so hold." (App. 77). The Court went on to say that the reorganization court, not the Indiana court, had the responsibility to decide whether the issues before the reorganization court were barred by the prior confirmation judgment of the Indiana court. The Court said the confirmation proceeding "had only the *limited purpose* to review the arbitration proceedings to 'see that the award was a proper award and that the arbitrators acted honestly, and did not exceed their powers.'"[9] (Court's emphasis) (App. 78). The Seventh Circuit assumed there was a justiciable "controversy" between Amtrak and Penn Central and did not directly discuss the contention of Penn Central that there was no such controversy. The Seventh Circuit concluded its decision as follows:

> "In view of the foregoing, we hold that the Declaratory Judgment of the Indiana Court was an improper exercise of its limited jurisdiction and

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[9] As explained in part 3 of the Reasons for Granting the Writ below, a confirming court also has the obligation to see that the arbitration award is lawful and does not interfere with the statutory laws of the land, *e.g.*, the Rail Act.

was wrong on the merits.[10] According, the judgment of the Indiana Court is reversed. This case is remanded to the Indiana Court with directions to vacate its declaratory judgment.

"The issues hereinabove discussed are within the exclusive jurisdiction of the Pennsylvania Reorganization Court and it may now proceed therewith." (App. 79).

REASONS FOR GRANTING THE WRIT

Summary of Reasons for Granting the Writ. There are three basic reasons why Amtrak believes the Seventh Circuit's decision is dead wrong and should be reviewed by this Court, either (1) because the decision calls for the exercise of this Court's power of supervision, or (2) because the Seventh Circuit's decision decides important questions of federal law which have not been, but should be settled by this Court, or (3) has decided federal questions in ways that conflict with the applicable decisions of this Court and with the decisions of other Circuits.

The first reason discussed below is that the Seventh Circuit is wrong in holding that the Indiana court had no jurisdiction under 28 U.S.C. §§ 2201-2202 to enter the declaratory judgment. The Indiana court had the power that every federal court has to declare what the law is and

[10] If the Seventh Circuit's decision does hold that the Indiana court was "wrong on the merits" in the sense that the Indiana court should have held that the Rail Act does excuse Penn Central from its obligations under the confirmation judgment, then the Seventh Circuit is doing precisely what it apparently said the Indiana court lacked the jurisdiction to do: decide the Rail Act defense! Of course, no one has explained why Congress could conceivably have meant by the Rail Act to take a valuable asset from Amtrak obtained by final judgment for the sole purpose of increasing the dollars in the Penn Central estate. But that question of statutory interpretation—if it can be called that—is presently under advisement in the Third Circuit. On the other hand, the Seventh Circuit's decision can more appropriately be read to say that the Indiana court was "wrong on the merits" in the sense that the Indiana court should have held that the confirmation judgment was not res judicata on the question of whether the Rail Act does or does not excuse Penn Central.

what a judgment means, particularly where, as here, the judgment is one rendered by that court in the first instance.

The second reason is that the reorganization court does not have the power to go behind the final confirmation judgment and rehear all defenses which Penn Central could have and should have raised in the confirmation proceedings as grounds to vacate the award. The reorganization court cannot invalidate and set aside a valid judgment of a sister federal court, for that is a result contrary to the Basic Agreement, to the intention of Congress in enacting the Federal Arbitration Act and the Declaratory Judgment Act, and to Article III of the United States Constitution. The declaratory judgment did not in any way interfere with the legitimate powers of the reorganization court.

The third reason is that the Indiana court, vested with the jurisdiction to hear the declaratory judgment action and after hearing all the parties' contentions, decided the action correctly under the law. Penn Central *did* have an obligation to raise the Rail Act defense in the confirmation proceedings and, since it did not do so, it cannot raise it later in the reorganization court.

Because the question of what the declaratory judgment did vis-a-vis the reorganization court's prerogatives was obviously pivotal for the Seventh Circuit, Amtrak would like to state at the outset and in the most unequivocal terms what Amtrak was *not* trying to do in the declaratory judgment action. Amtrak was not trying to "enforce" the arbitration award as that word is used by Penn Central to indicate interference with the jurisdiction of the reorganization court. Throughout the Seventh Circuit's opinion are the words "enforce" and "enforcement" in referring to the arbitration award. Yet, those words do not accurately describe what the declaratory judgment action was meant to do. As shown below, the Seventh Circuit simply misunderstood the function of the Indiana court vis-a-vis the

reorganization court, which at that point in time had had much of its powers removed by the Rail Act.

A reorganization court under section 77 of the Bankruptcy Act may have exclusive jurisdiction over the property of the debtor and have plenary powers to carry out the administration and reorganization of properties. But that does not mean that the *liability* of the trustees of the debtor's property arising out of their operation of the debtor's business must always be determined in the reorganization court. Other courts may be required by law to fix this *liability* even though payment upon the liability may still have to be administered by the reorganization court. Stated briefly: liability of the trustees, under certain circumstances, can be finally determined and fixed in a nonbankruptcy court, even though the bankruptcy court has the exclusive authority to say when and how payments from the estate are to be made to satisfy that liability.

It is abundantly clear that when the Indiana court entered the confirmation judgment on the award of the arbitrators, the court was exercising a judicial power to finally determine the liability of Penn Central and the validity of the award. There was a line to be drawn between the functions of the confirming Indiana court and the reorganization court, both of which are enforcing arms of the United States Government in applying the laws of the land, including the application of the Rail Act. Because of judicial comity, this line was shadowy and wavering during the confirmation proceedings and the show-cause hearing of the reorganization court, but it ultimately had to be drawn by the Indiana court or its functions as a confirming court given up. The Indiana court did intend to exercise its fullest judicial powers in deciding whether or not Penn Central was liable to comply with the arbitration award, even though satisfaction of the award from the assets of the Penn Central estate would have to be administered by the reorganization court.

Having taken the jurisdiction to hear and decide the case in the first instance, the Indiana court could not ignore the opinion of the dissenting arbitrator who claimed the award was invalid because of the Rail Act. The Indiana court could not pass the cup of problems raised by the Rail Act to the reorganization court and still remain responsible for confirming the legality of the award and for merging it into a judgment. Chief Judge Steckler settled the issue of the Rail Act's application to the legitimacy of the restoration award when he entered judgment upon the award pursuant to 9 U.S.C. § 13.

In filing the declaratory judgment action, Amtrak was not trying to interfere with the administration of the bankrupt estate by the reorganization court. The declaratory judgment entered by the Indiana court certainly did not do that. It only declared what the earlier confirmation judgment meant and what the Indiana court believed the applicable law to be concerning the contractual dispute over past breaches by Penn Central and the corresponding liability of Penn Central for those breaches. No assets of the estate were affected by the declaratory judgment. No determination was made as to how and when the confirmation judgment was to be satisfied in dollars. The reorganization court's grip on the purse strings of the estate was not loosened. Suffice it to say that the reorganization court's jurisdiction was properly recognized by the Indiana court. Unfortunately, the Indiana court's jurisdiction was not properly recognized by the seventh Circuit.

This Court should issue a writ of certiorari so that federal courts faced with the problem of marking properly the jurisdictional line between bankruptcy and nonbankruptcy courts will not rely upon the erroneous decision of the Seventh Circuit herein. This is a case having significant questions of judicial power, questions which are also very important to the future of Amtrak.

1. The Indiana Court Had Jurisdiction Under the Declaratory Judgment Act to Declare the Validity, Finality and Legal Significance of Its Own Prior Confirmation Judgment.

Amtrak would like to point out two things about the conceptual framework within which the declaratory judgment was rendered. First, Amtrak believes the Indiana court had a legal right to declare what the law was and what the confirmation judgment meant in light of the law. On that point, the Seventh Circuit said that it was "unable to find any precedent * * * for referring back to the court of first adjudication [the Indiana court] the question of whether its judgment is *res judicata* in another court [the reorganization court]." (App. 78). This is a question of first impression in this Court which should now be decided by the Court. Second, there was clearly a "controversy" between Amtrak and Penn Central sufficient to give the Indiana court jurisdiction under the Declaratory Judgment Act, after the confirmation judgment was entered and Penn Central for the first time in a court raised the Rail Act as a complete defense to Amtrak's right to have Penn Central live up to the obligations memorialized in the confirmation judgment. The Seventh Circuit did not discuss this issue, but merely assumed there was a "controversy" (App. 77). This Court should grant the petition for writ of certiorari because the Seventh Circuit's decision, if allowed to stand, could threaten to diminish the utility of the Declaratory Judgment Act to courts and litigants alike.

The Declaratory Judgment Act has now been law for more than forty years and debates over whether or not decisions declaring legal rights and relationships are "advisory opinions" (as alleged by Penn Central) should have long since passed away, set to rest by the words of the statute itself and by *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 57 S.Ct. 461 (1937). The Declaratory Act provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201.

The words "actual controversy" of this statute were intended to bring the Act within the Constitution, nothing more. Article III, section 2, of the Constitution limits federal justiciability to "cases" and "controversies," and the Congress could not enlarge the jurisdiction of federal courts to declare legal rights beyond this constitutional limitation. Chief Justice Hughes in *Aetna Life* defined an actual controversy as contemplated by 28 U.S.C. § 2201 in this manner:

> "A 'controversy' in this sense must be one that is appropriate for judicial determination. * * * A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. * * * The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. * * *" 300 U.S. at 240-41, 57 S.Ct. at 464.

And these broad concepts were later reduced to more

concrete terms in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510 (1941). Speaking for the Court, Justice Murphy stated:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, that that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. • • •" 312 U.S. at 273, 61 S.Ct. at 512.

In light of *Aetna Life* and *Maryland Casualty*, there was clearly a new controversy between Amtrak and Penn Central on May 5, 1976, when Amtrak filed its complaint for a declaratory judgment.

The controversy was over the scope, meaning, effect and validity of the Indiana court's confirmation judgment of March 26, 1976, and the ambiguity surrounding that judgment. As stated above, Penn Central consented to the entry of the confirmation judgment under the mandates of the Federal Arbitration Act, including 9 U.S.C. § 13, which says in relevant part:

> "• • •
>
> "The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."

Yet, once the confirmation judgment was entered and Amtrak's hopes for restoring rail passenger service to the Midwest were on the upswing, Penn Central cast shadows upon these hopes for the future by refusing to

take steps to comply with the confirmation judgment and stating in the reorganization court that all of Penn Central's obligations had vanished because of the Rail Act and the transfer of the tracks to ConRail. Penn Central responded to Amtrak's request in the reorganization court for the issuance of an order to "direct, instruct, and authorize" Penn Central to comply with the confirmation judgment by saying bluntly that the confirmation judgment was a nullity so far as Penn Central was concerned. Penn Central even went so far as to ask the reorganization court to enjoin Amtrak from "seeking execution or enforcement." When that response was filed, it was clear that neither the end of the arbitration proceedings nor the confirmation judgment on the arbitration award had set the rail line dispute to rest. The parties remained in hopeless disagreement as to the legal effect and validity of the confirmation judgment.

On the one hand, Amtrak contended that the validity and legality of the arbitration award under the Rail Act and under all other laws of the United States had already been adjudicated in the confirmation proceedings and could not be relitigated elsewhere. The majority of the National Arbitration Panel who fashioned the arbitration award obviously believed Penn Central could cause the restoration plan for the tracks to be carried out or they would not have made an award, but they concluded their award by noting their uncertainty as to the law and their belief that the effect, if any, of the Rail Act upon the award was a matter for the confirming court and not the arbitrators. Under these circumstances it would make little sense to have the Indiana court enter its judgment upon the arbitration award if that court was not the proper tribunal to consider the legality of the award under the laws of the United States. Amtrak believed that Penn Central's attempt to relitigate the same issues that were settled by the con-

firmation judgment was nothing more than vexatious duplicative litigation.

Common sense or not, Penn Central contended on the other hand that the Indiana court did not have the duty or the power in the recently completed confirmation proceedings to look beyond the contents of the award itself to determine whether or not the restoration plan could be lawfully carried out. Penn Central rationalized that since the assets of the estate from which the cost of the restoration would ultimately have to come[11] were in the exclusive custody of the reorganization court, only that court could "enforce" the arbitration award and hence only that court could judge whether or not the restoration was or was not compatible with the Rail Act or other statutes. This argument was summarized most simply during the declaratory judgment proceedings when Penn Central said that: "Whether Amtrak * * * merely has an arbitration award or a confirmed arbitration award, is immaterial."

To bolster its position that there was no justiciable dispute between the parties after the confirmation judgment was entered, Penn Central kept focusing attention upon contractual obligations under the Basic Agreement, saying that any contract dispute had been settled by the arbitration award. It is true that the contract dispute was settled in Amtrak's favor once there was a finding that Penn Central had breached the Basic Agreement contemplated by section 401(a) of the Amtrak Act, 45 U.S.C. § 561(a), and was required under the Arbitration Agreement to make reparation by causing the Indiana tracks to be restored in accordance with the Panel Program. There was no disagreement there. The disagreement is whether this program

[11] Because the tracks at issue here were no longer in the constructive possession of the reorganization court, gone was the underlying justification for the broad injunctive powers of section 77 reorganization courts in trying to prevent interference with the operation of bankrupt railroads under court supervision.

is legally entitled to be enforced[12] in light of the judgment entered upon it or whether the confirmation judgment was a nullity and could be collaterally attacked. The declaratory judgment complaint did *not* seek relief based upon the contract dispute, but upon the confirmation judgment itself. What was really in controversy was not the contract default of Penn Central, but was the judicial power of the Indiana court to fully decide the validity of the arbitration award under the Federal Arbitration Act.

Thus, the problem for Amtrak was not one of enforcement. The problem was only one of seeking and fostering an authoritative, comprehensive and controlling understanding of the March 24, 1976, mandate of the Indiana court's confirmation judgment. In such a circumstance the declaratory procedure used by Amtrak presented an ideal method for resolving the conflict, and in past years numerous courts have given declarations under both state and federal declaratory judgment statutes to clarify an ambiguous judgment or to determine its legal effect. *See Connecticut Sav. Bank* v. *First Nat. Bank & Trust Co.*, 133 Conn. 403, 51 A.2d 907 (1947) (whether prior judgment was collateral estoppel on an issue between the parties); *Aetna Life Ins. Co.* v. *Martin*, 108 F.2d 824 (8th Cir. 1940) (clarification of prior state court judgment under an insurance contract); *Boman* v. *Belyeu*, 255 Ala. 281, 51 So.2d 27 (1951) (determination of whether prior judgment was a personal judgment); *National-Ben Franklin Fire Ins. Co.* v. *Camden Trust Co.*, 21 N.J. 16, 120 A.2d 754, 757 (1956) (resolution of controversy over prior judgment); *Talcott* v. *Talcott*, 54 Cal.App.2d 743, 129 P.2d 946, 948 (1942) (determination of rights under prior probate decree); *Stavros* v. *Bradley*, 313 Ky. 676, 232 S.W.2d 1004, 1006 (Ky.App. 1950) (det

[12] *When* and *how* the award will be enforced is another question. Both the time and manner of providing estate funds for enforcement are matters for the reorganization court since the property of the debtor is in its custody. See the next section of this petition.

mination of effect of prior judgment on parties' rights); *Beach* v. *Beach,* 57 Ohio App. 294, 13 N.E.2d 581, 582 (1937) (clarification of settlement agreement terms contained in prior divorce decree); *Barnes* v. *Pierce,* 36 Tenn.App. 181, 253 S.W.2d 33, 36 (1952) (interpretation of prior consent decree); *Bengtson* v. *Setterberg,* 227 Minn. 337, 35 N.W.2d 623, 626 (1949) (power of courts to declare rights based on prior judgments); *Avery Freight Lines, Inc.* v. *White,* 245 Ala. 618, 18 So.2d 394, 398 (1944) (consideration of the validity and legal effect of a former judgment); *Meeks* v. *Town of Hoover,* 286 Ala. 373, 240 So.2d 125, 127 (1970) (declaratory judgment was appropriate as to issues that court had decided in a previous case). *See generally,* Borchard, *Declaratory Judgments,* p. 356 (2d ed. 1941), 60 Harv. L. Rev. 979 (1947), and 62 Harv. L. Rev. 787, 841 (1949). The Declaratory Judgment Act by its express words gives federal courts broad authority to declare "rights, status and other legal relations." 28 U.S.C. § 2201. Such declarations do not derogate from the binding force of a prior decision, but rather they make its determination more certain.

The "force and will" of federal courts' judgments seldom have to depend upon the sword. It is the high degree of credit which society accords to legal decrees which gives them their mystical power to influence and shape behavior of men. The Declaratory Judgment Act should therefore be liberally construed to obtain an understanding of ambiguous or challenged judgments by the declaratory remedy. The complaint for a declaratory judgment by Amtrak was a lawful means for presenting a case or controversy otherwise cognizable by federal courts. *See, Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U.S. 249, 264, 53 S.Ct. 345, 348 (1933) (declaratory procedure was within appellate judicial power); *Allstate Ins. Co.* v. *Employers Liability Assur. Corp.,* 445 F.2d 1278, 1280 (5th Cir. 1971), *Freeman* v. *Marine Midland Bank-New York,* 419 F.Supp.

440, 450 (E.D. N.Y. 1976), and *Lehigh Coal & Nav. Co.* v. *Central R. of N.J.,* 33 F.Supp. 362, 365 (E.D. Pa. 1940) (granting a declaratory judgment rests in the sound discretion of the trial court, which discretion should be liberally exercised in the public interest); *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 78 S.Ct. 1209 (1958) (prior decision upholding city's right to condemn state property for power project declared res judicata and city's bonds declared valid under federal law); *De Veau* v. *Braisted,* 336 U.S. 144, 80A S.Ct. 1146 (1960) (plaintiff's suspension from waterfront union because of conviction of felony, as required by New York law, declared valid); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 83 S.Ct. 671 (1963) (declaration regarding coverage of NLRA); *United States* v. *Louisiana,* 394 U.S. 11, 89 S.Ct. 773 (1969) (rights of parties in submerged coastal lands declared); *Gunn* v. *University Committee to End War in Viet Nam,* 399 U.S. 383, 90A S.Ct. 2013 (1970) (declaratory judgment concerning a state disturbing-the-peace statute).

The only case which the Seventh Circuit cites to the contrary is *Donovan* v. *City of Dallas,* 377 U.S. 408, 84A S.Ct. 1579 (1964), a case in which the Court was concerned only with a state court's lack of power to restrain a party's access to the federal courts. The Seventh Circuit's reliance on *Donovan* is misplaced for at least two reasons.[13] First, the present case involves the jurisdiction of two federal courts and the effect of the Indiana court's judgments upon the jurisdiction of the reorganization court. There is no state court involvement here. Amtrak had a right given by Congress to invoke the jurisdiction of the Indiana court and, correspondingly, the Indiana court had a duty to

[13] By issuing the declaratory judgment, the Indiana court was also fostering a definitive understanding of the confirmation judgment and helping to prevent the type of duplicative litigation discussed by Justice Harlan's dissent in *Donovan,* 377 U.S. at 415, 84A S.Ct. at 1583.

exercise that jurisdiction. *Cohens* v. *Virginia,* 6 Wheaton 264, 404 (1821). Second, the Indiana court's declaratory judgment determined that the prior confirmation judgment was res judicata on certain issues between Amtrak and Penn Central. The Indiana court did not enjoin Penn Central from proceeding in the reorganization court or in any other way to attempt to prevent Penn Central's access to another arm of the federal system.

The Indiana court had the right given by Congress to every federal court to declare what the law was and what the confirmation judgment meant, *i.e.,* to declare the scope and nature of the confirmation judgment entered under the mandate of the Federal Arbitration Act. The Seventh Circuit's contrary holding presents an issue that is ripe for consideration by this Court.

2. In Entering the Declaratory Judgment, the Indiana Court Did Not Interfere with the Proper Jurisdiction of the Reorganization Court. The Reorganization Court Does Not Have the Power To Go Behind the Confirmation Judgment And Rehear All Defenses of Penn Central to the Arbitration Award.

The threshold question in this litigation when it began on February 4, 1976, the day Amtrak filed its petition to confirm the arbitration award in the Indiana court, was who would decide the liability of Penn Central—the Indiana court or the reorganization court. After the Indiana court entered the confirmation judgment with the consent of Penn Central and without intervention by the reorganization court, Amtrak would have thought that that threshold question had been answered once and for all with the unanimous response: the Indiana court. Amtrak still believes that that answer is the correct one, although part II of the Seventh Circuit's decision (App. 74-77) means that there is now something less than unanimity on the question. As Amtrak will show below, the Seventh Circuit's conclu-

sion that the Indiana court's declaratory judgment was an improper interference with the jurisdiction of the reorganization court is simply not legally supportable. The Supreme Court should grant certiorari so that Amtrak can bring to this Court a decision that Amtrak believes improperly marks the boundary between the power of one federal court to enter a judgment under the Federal Arbitration Act and under the Declaratory Judgment Act, and the power of another federal court under the Bankruptcy Act to review and refuse to honor a final judgment of the first federal court.

As Amtrak emphasized above, part II of the Seventh Circuit's opinion discussing the purpose of the declaratory judgment is couched largely in terms of "enforcement" of the confirmation judgment and relies upon the exclusive jurisdiction of a reorganization court to determine the status of claims made in the bankruptcy estate. Amtrak has never disputed the authority of the reorganization court to carry out the administration and reorganization of the debtor's properties, including deciding how and when payments out of estate assets are to be made and in what priority. That has never been the issue, as the Seventh Circuit should have realized in quoting a paragraph from one of Amtrak's early briefs which acknowledged that execution by Amtrak of the confirmation judgment would need to be done in the reorganization court (App. 71). Thus, by citing and relying upon cases like *Baker* v. *Gold Seal Liquors, Inc.,* 417 U.S. 467, 94A S.Ct. 2504 (1974), the *New Haven Inclusion Cases,* 399 U.S. 392, 90A S.Ct. 2054 (1970), *Kalb* v. *Feuerstein,* 308 U.S. 433, 60 S.Ct. 343 (1940), and *In Re New York, New Haven and Hartford Ry. Co.,* 457 F.2d 683 (2d Cir.), *cert. denied sub nom. Smith* v. *Baker,* 409 U.S. 890, 93 S.Ct. 106 (1972), the Seventh Circuit was merely stating the obvious—that the reorganization court had exclusive jurisdiction over the assets of the debtor and those assets cannot be appropriated for lia-

bilities of the estate until the reorganization court has a chance to fit payment into the overall administration of the estate.[14] The issue here is whether or not a nonbankruptcy court can, with the consent of the bankruptcy court, finally determine the liability of the trustees on certain claims, even though that determination will eventually need to be taken back to the reorganization court by the prevailing party for payment with all the other claims against the estate. And, if it can, does some stretch of the bankruptcy power permit the reorganization court to readjudicate the question whether the trustees are liable in the first place?

The reorganization court *did* permit claims between Penn Central and Amtrak to be arbitrated and litigated outside the confines of the reorganization court. Specifically, the reorganization court permitted its trustees to contract with Amtrak and consented to the settlement by binding arbitration before the National Arbitration Panel

[14] Also, the facts and holdings in *Baker, New Haven Inclusion, Kalb* and *New York* do not support the Seventh Circuit's conclusion that the declaratory judgment was an interference with the appropriate jurisdiction of the reorganization court. Those four cases cannot be stretched as far as the Seventh Circuit would need to stretch them to make the reorganization court a czar over other federal courts, the concept implicit in the Seventh Circuit's opinion. For example, *Baker* held that the nonbankruptcy court's set-off of the creditor's claim against the trustees for damage to shipments, against the trustees' claims against the creditor for freight charges, resulted in a "preference to the claim of one creditor over the others by the happenstance that it owes freight charges that the others do not." 417 U.S. at 474, 94A S.Ct. at 2508-09. In *New Haven,* the Court held that the value of a section 77 debtor's estate should be decided by the reorganization court, not the nonreorganization court. *Kalb* involved a situation where a state court had entered a foreclosure decree after a section 75 bankruptcy petition had been filed. This Court held that the bankruptcy proceedings had divested the state court of its jurisdiction. That decision was based upon federal supremacy, an issue not involved here. *New York*, like *Kalb*, involved one court's attempt to place a lien and constructive trust upon the bankrupt's property which was already within the constructive possession of the bankruptcy court. In short, none of the cases cited by the Seventh Circuit addresses the question of the permissible scope of a nonbankruptcy court's ability to determine the underlying liability of the debtor on claims which the bankruptcy court has permitted to be decided elsewhere.

of all disputes under the Basic Agreement and the Arbitration Agreement (Article Six of the Basic Agreement and section 4.2 of the Arbitration Agreement), and to the entry of a confirmation judgment upon an arbitration award entered by the Panel by any United States district court (section 4.3 of the Arbitration Agreement). Order No. 238 of the reorganization court authorized Penn Central to comply with the Basic Agreement "without further order or action" by the reorganization court but said a "decision" resolving a dispute in accordance with the Basic Agreement or the Arbitration Agreement should be submitted to the reorganization court "for review and approval before becoming finally binding upon the Trustees or the Debtor." From the outset, Amtrak construed Order No. 238 to mean that no execution could be had against the estate's assets, and that the trustees could not authorize the expenditure of estate funds to comply with an award until a review was made by the reorganization court as to how and when the award should be satisfied. There was a sound legal basis for this construction.

It is well established that a section 77 reorganization court need not draw to itself all questions or rights of action affecting the estate. Jurisdiction can be relinquished and the trustees sent to be sued in another court as long as the reorganization court's authority to administer and reorganize the railroad was not impaired and the property of the debtor remained in the reorganization court's exclusive custody until released. *See Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 60 S.Ct. 628 (1940); *Foust* v. *Munson S.S. Lines*, 299 U.S. 77, 57 S.Ct. 90 (1936); *Armstrong* v. *Alliance Trust Co., Ltd.*, 112 F.2d 114 (5th Cir. 1940); and 6 *Collier On Bankruptcy* ¶ 3.08[1] (14th ed. 1977). *Accord, In Re Wonderbowl, Inc.*, 456 F.2d 954 (9th Cir. 1972). In some instances, the Bankruptcy Act itself expressly permits suits against trustees to be brought in other courts, *e.g.*, 11 U.S.C. § 205(j). Amtrak, therefore, consid-

ered it was quite free to bring an arbitration award to *any* United States district court for confirmation, and later to seek the declaratory judgment interpreting the confirmation judgment outside the reorganization court.[15] The Arbitration Agreement expressly provided for confirmation outside the reorganization court, and since the Basic Agreement clearly fell within the provisions of 28 U.S.C. § 959, the leave of the reorganization court to carry out the Arbitration Agreement was not required. *See Novo Enzyme Corp.* v. *Baker,* 361 F.Supp. 337 (S.D. N.Y. 1973) (a case involving Penn Central); and *Diners Club, Inc.* v. *Bumb,* 421 F.2d 396 (9th Cir. 1970).

These are the general principles and they provide no support for the Seventh Circuit's adoption of Penn Central's position that some inherent bankruptcy power permits the reorganization court to reserve to itself the power to relitigate issues determined elsewhere. The same is true of the Seventh Circuit's apparent reliance, at least in part, upon Order No. 238 of the reorganization court as a ground for vacation of the declaratory judgment. In the first place, the trustees were authorized to enter into the Basic Agreement and the Arbitration Agreement with Amtrak, contracts which contained the "level of utility" basis for Penn Central's obligation and the arbitration provisions as well. Second, the jurisdiction of other federal courts to fix the liability of Penn Central upon an arbitration award is determined by statute, not by Order No. 238. The Bankruptcy Act may or may not have authorized the reorganization court to stay the confirmation or the later declaratory judgment proceedings in Indiana or to order they be heard only in the reorganization court notwithstanding

[15] Amtrak felt very strongly about its right to have the arbitration award confirmed by the Indiana court, not only because of the importance of the whole concept of binding arbitration and confirmation in any federal court to the rail passenger system required by the Amtrak Act, but also because the situs of the tracks, as well as the related C & O case, were both in Indiana.

the Arbitration Agreement or the Amtrak Act. But this is not the question here, since the reorganization court took none of these actions. The Bankruptcy Act gives a bankruptcy court the discretion to permit litigation against trustees to proceed in another court, either state or federal, and Penn Central appeared in Indiana with the approval of the reorganization court. When this is done, the judgment of the other court resolves the liability issue and liability may not be relitigated in the bankruptcy court. *Fischer* v. *Pauline Oil & Gas Co.,* 309 U.S. 294, 60 S.Ct. 535 (1940); and *Boynton* v. *Ball,* 121 U.S. 457, 7 S.Ct. 981 (1887). A judgment validly entered by another court of competent jurisdiction against the trustees is binding upon the bankruptcy court when a claim based upon such judgment is presented. *In re Chicago & E. I. Ry. Co.,* 121 F.2d 785, 789 (7th Cir.). *cert. denied,* 314 U.S. 653, 62 S.Ct. 102 (1941). The doctrine is well stated in 1 *Collier On Bankruptcy* ¶ 2.07, pp. 166-67 (14th ed. 1974), as follows:

> "* * * But, once the controversy is properly submitted to a non-bankruptcy court, that court has jurisdiction of all the incidents of the litigation, and the judgment thereon is binding on the trustee or receiver as the case may be."

What might have been done by the reorganization court by injunction or otherwise, prior to the entry of the confirmation judgment or the declaratory judgment in Indiana, is immaterial. Chief Judge Steckler heard and decided the Amtrak petition for confirmation[16] without interference

[16] The jurisdiction of the Indiana court to enter its judgment upon the award was, of course, anchored in 28 U.S.C. § 1332 and 9 U.S.C. §§ 1, 9 and 10. There is no controversy about that. The parties are agreed on this point. Furthermore, the Indiana court itself had jurisdiction to determine the question of its own jurisdiction and, having done so, this determination is res judicata and not subject to collateral attack. *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317 (1940); *Stoll* v. *Gottlieb,* 305 U.S. 165, 59 S.Ct. 134 (1938); and *In Re Universal Display & Sign Co.,* 541 F.2d 142, 144, 146 (3d Cir. 1976). If the trustees had any doubts about the authoritative competence of the Indiana court to enter a final judgment upon the arbitration award,

and in fact with the consent of Penn Central and the reorganization court, and having found no grounds for vacating the award, he entered his judgment upon it in accordance with the statutory mandates of the Federal Arbitration Act. Sections 9 and 13 of this Act provide in relevant part as follows:

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award * * * any party to the arbitration may apply * * * for an order confirming the award, and *thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.* * * *" § 9 (Emphasis added).
>
> and
>
> "* * *
>
> "The judgment shall be docketed as if it was rendered in an action.
>
> "The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13.

Order No. 238 cannot serve to change this statutory language, nor can it sap from the Indiana court its authority to rule upon the cases that were before the court. In confirming the award and later declaring its meaning, the Indiana court was exercising the judicial powers of the United States, and its powers to finally settle the controversy as to the legal liability of Penn Central did not depend upon the consent of the reorganization court, but only upon Article III of the United States Constitution.

The second problem with the Seventh Circuit's reliance upon Order No. 238 is that the order was conceived out

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the trustees could have appealed the confirmation judgment. But they obviously did not have any doubts and no appeal was taken.

of an erroneous concept. In 1971, the reorganization court had a notion that the Arbitration Agreement might in some way have contravened the requirements of the Bankruptcy Act, and the court was not sure it could authorize the submission of controversies affecting the estate to final and binding arbitration. Therefore, when objection was voiced by a single creditor to court approval of the Agreement, the reorganization court now says that Order No. 238 was fashioned to meet this objection (App. 114-15).[17] If that was the purpose of the order, it was wholly unnecessary. Even had there been a prohibition in the Bankruptcy Act against such a submission (which there is not), section 306(e) of the Amtrak Act relieved Penn Central's trustees "from all prohibitions of existing law" as was necessary to enable them to enter into the Agreement "and to perform their obligations thereunder." 45 U.S.C. § 546 (e).

Lastly, if the underlying purpose of Order No. 238 was to protect the estate from unforeseeable erosions growing out of the obligations of Penn Central under the Basic Agreement, as the reorganization court now says it was,

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[17] The reasons given for the "review and approval" notion in Order No. 238 are clouded and hence do not supply any insight into the scope of the review that was intended. Indeed, the standards of this review are not described, but the judicial review of arbitration awards prescribed by the Federal Arbitration Act apparently is not in the reorganization court's mind a "meaningful judicial review." (App. 114). In Order No. 2569, the reorganization court states Order No. 238 was in response to a "heavy attack" made against the Arbitration Agreement by the creditors at an April 23, 1971 hearing to decide whether the Amtrak contracts should be approved (App. 116). But in its opinion written in 1971 in support of Order No. 238, the reorganization court stated: "The only opposition to the proposed contract has been expressed by the United States Trust Company of New York. * * * These objections are without merit." The changed view concerning the weight of the opposition may have been due to hindsight. Compliance with the rail line obligations of the Basic Agreement became more burdensome in 1976 than was contemplated in 1971 when there was every expectation that Penn Central's rail lines would be properly maintained in the normal operation of the railroad under section 77 of the Bankruptcy Act. However, this cannot be a legal standard for voiding awards.

then the order was not properly designed from the very first. There is no doubt that whenever administrative costs were incurred by Penn Central under the Basic Agreement, there was bound to be at least some injury to the pocketbook interests of all creditors of the same or lesser priority. However, it does not follow that for this reason all arbitration awards arising out of the Agreement are therefore legally vulnerable if their impact upon these creditors is too great. To contend that there must be such a remedy for these creditors whenever Amtrak claims serious injury to itself because of Penn Central's defaults is to contend that Amtrak is "fair game" when Penn Central must hunt for the monies to finance the proper railroad operations of the debtor. This cannot be so. Amtrak should not be singled out from all other creditors and penalized to save some of the administration expenses of the estate.

The only injury to the estate from valid arbitration awards arising out of the Basic Agreement is that Penn Central must do what the Basic Agreement requires. Trustees cannot accept the benefits of an executory contract without accepting the burdens as well. *Schokbeton Industries, Inc.* v. *Schokbeton Products Corp.*, 466 F.2d 171, 175 (5th Cir. 1972); and *Hurley* v. *Atchison, Topeka & Sante Fe Ry. Co.*, 213 U.S. 126, 29 S.Ct. 466 (1909). Penn Central could not be permitted to speculate on the outcome of an arbitration proceeding, accepting the agreed upon process only if the award was favorable and rejecting it if it was not. *See Tobin* v. *Plein*, 301 F.2d 378, 381 (2d Cir. 1962); and *In Re Patterson-MacDonald Shipbuilding Co.*, 284 F. 277, 281 (W.D. Wash. 1922), *aff'd.*, 292 F. 700 (9th Cir. 1923), *appeal dismissed sub nom. Commonwealth of Australia* v. *McLean*, 266 U.S. 638, 45 S.Ct. 10 (1924). Order No. 238 gives the reorganization court no legal basis for a *de novo* review of arbitration awards or any power to say a valid arbitration award confirmed by another

federal court shall have no impact. Had the reorganization court wished to do this, the court ought to have disapproved acceptance of the tendered Amtrak contracts; but then matters would have been "quite bleak" for the creditors, and Amtrak would have saved the hundreds of millions of dollars which it has spent in the past five years by assuming the common carrier obligations of Penn Central to operate intercity rail passenger service in the Northeast and Midwest.

From all of the above, it is abundantly obvious that the question of who should decide all issues surrounding the liability of Penn Central—Judge Fullam or Chief Judge Steckler—was answered when the reorganization court took no action to enjoin or stay the confirmation or declatory judgment proceedings in Indiana. Penn Central appeared before Chief Judge Steckler, presented their cases, responded to Amtrak's pleadings with reorganization court approval, and judgments were entered against Penn Central as prescribed by the Arbitration Act and the Declaratory Judgment Act.[18] As to the confirmation judgment, the reorganization court recognized this when it said in Order No. 2569:

> "The judgment confirming the award is a final judgment, and is entitled to be given *res judicata* effect in these proceedings. No one has ever contended otherwise. In short, it is now finally settled that the Trustees had not fully complied with their obligation to maintain the trackage involved, and that Amtrak was entitled to have the situation speedily remedied. * * *" (App. 118).

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[18] The confirmation judgment is now a final one and valid even if erroneous. *See Stoll* v. *Gottlieb*, 305 U.S. 165, 59 S.Ct. 134 (1938); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317 (1940); *In Re Universal Display and Sign Co.*, 541 F.2d 142, 144 (3d Cir. 1976); and 1B J. Moore, *Federal Practice* § 0.405 [4.-1] (2d ed. 1974).

Unfortunately, the reorganization court and now the Seventh Circuit fail to realize that the same principles make the declaratory judgment equally valid.

These, then, are some of the important legal reasons why Amtrak believes that part II of the Seventh Circuit's opinion is patently incorrect. In addition, there are constitutional considerations here, as well as questions of judicial propriety which compel Amtrak to seek review of the Seventh Circuit's decision in this Court.

Inasmuch as the Constitution does not require bankruptcy to be administered by the judiciary, the mischief implicit in the idea that the Bankruptcy Act grants an all inclusive kind of revisory power over the judgments of our constitutional courts is apparent. As in all matters, federal courts sitting in bankruptcy, though having very broad and far-reaching powers, are courts of limited jurisdiction. Their authority over other federal courts exists only to the extent that it is granted by the Bankruptcy Act and the Federal Judicial Code. Amtrak contends the Bankruptcy Act does *not* grant a reorganization court by an Order No. 238 the power to modify section 13 of the Federal Arbitration Act or the power to change the nature of a confirmation judgment from a final judgment to one which merely certifies the legitimacy of the arbitration process. Nor does the Federal Judicial Code give reorganization courts appellate review over awards held to be valid in confirmation proceedings. Order No. 238 could not possibly have prohibited the Indiana court from applying the laws of the land to the arbitration award when judgment was entered upon the award since the Bankruptcy Act does not grant section 77 reorganization courts general veto or supervisory power over district court judgments.

The judicial expressions that the Bankruptcy Act is paramount law and a section 77 reorganization court is armed with extensive powers to avoid judicial liens, preferences or fraudulent transfers and can stay proceedings of

other courts do not go as far as to make reorganization courts the czars over our judicial system. The notion that the Bankruptcy Act can impose such limitations upon the judicial powers of an Article III court to apply the laws of the United States in deciding cases or controversies arising between opposing parties is quite different from the legal principle that the exclusive and paramount authority of a reorganization court over the debtor gives it inherent powers to stay *proceedings* in other courts to protect its ability to administer the estate and reorganize the railroad debtor. The notions of Penn Central as to the exclusive competency of the reorganization court to resolve all disputes concerning the Penn Central estate is a serious oversimplification of what is involved. As in the whole field of federal jurisdiction, there is a delicate task in bankruptcy jurisdiction of balancing political expediency and procedural efficiency. The simplest procedure might have been to require a reorganization court to adjudicate all litigation arising out of the operation of the debtor railroad, but the Congress did not pursue this course of action. Quite the opposite is true. Congress decided differently and enacted 28 U.S.C. § 959 and 11 U.S.C. § 205(j), which permit suits outside the reorganization court. Moreover, Congress, not reorganization courts, decide not only which of the various federal courts is appropriate to take jurisdiction over suits falling within the definitions of 28 U.S.C. § 959, but also whether the special rules of section 306(e) of the Amtrak Act, 45 U.S.C. § 546(a), are appropriate for the statutory scheme for preserving and restoring rail passenger service. *See National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers,* 414 U.S. 453, 94 S.Ct. 690 (1974).

Penn Central and the Seventh Circuit invoke no statutes which make arbitration awards under the statutory Basic Agreement and Arbitration Agreement reviewable by the reorganization court or which make exceptions to the provisions of the Declaratory Judgment Act so questions of

law concerning the bankruptcy estate must be decided exclusively by the reorganization court. There are none, and *Gutensohn* v. *Kansas City Southern Ry. Co.*, 140 F.2d 950, 953 (8th Cir. 1944), teaches us that in a suit against a trustee, a declaration of rights on a question of law, without ordering anything done, will not *ipso facto* be considered an interference with the jurisdiction of a reorganization court. There is no interference with the administration and reorganization of the debtor's estate and the reorganization court's custody over the debtor's property is not disturbed. There is no statutory or other legal basis for stripping the Indiana court of declaratory judgment jurisdiction simply because of the pendency of the Penn Central reorganization proceeding. It goes without saying that the Indiana court is an experienced and disciplined one and would not abuse its 28 U.S.C. § 2201 powers by interfering with the jurisdiction of a section 77 reorganization court. *See generally, Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 72 S.Ct. 219 (1952). Hence, there is no basis for saying the declaratory judgment jurisdiction of the Indiana court or any other jurisdiction granted to it by the Congress is automatically vitiated because it merely *threatens* the reorganization and administration of Penn Central's estate.

There are constitutional as well as legislative objections to the views of Penn Central, accepted by the Seventh Circuit, as to the reach of Order No. 238 and the powers which Penn Central asserts are in the reorganization court to limit the scope of the judgments of the Indiana court or to oust it from jurisdiction to hear a declaratory judgment proceeding. The Indiana court is a constitutional court vested with the judicial powers of the United States, and as such its jurisdiction to decide upon the validity of the arbitration award had to amount to more than examining the arbitration proceedings and certifying their integrity to another decision maker. Section 13 of the Federal

Arbitration Act, 9 U.S.C. § 13, makes clear that district court judgments upon arbitration awards are to be fully equated with "judgments in an action." Hence, the constitutional authority of the Indiana court to enter judgment upon the legality of the restoration award is not open to question. Like any judgment in an action, the confirmation judgment is a final judicial decision. As such, it has complete dominion over all questions concerning the merits and legal validity of the award to the broadest reach allowed the federal judiciary by Article III of the United States Constitution in the settlement of any case or controversy. Were this not so, the aspect of the "case" concept emphasized in *Hayburn's Case,* 2 Dallas 409 (1792), would be turned upon its head.

From the earliest days of our Republic, our constitutional courts have refused to enter judgments which are subject to revision elsewhere, and this concept merges with the prohibition against "advisory opinions" since such a situation was thought of as a rendering of advice to the revising authority. This concept is further supported by the doctrines of *Marbury* v. *Madison,* that courts were not empowered full blown by the Constitution to sit in judgment over the actions of the other branches of government but only upon the *compulsion* of a "case or controversy" which no one else will decide, invoking the judicial power of Article III only as a last resort, and reluctantly.

The Indiana court did not become seized with the controversies over the validity of the arbitration award and Penn Central's liability to Amtrak simply to advise the reorganization court about the arbitration process. The court had to dispose of the controversies—first the confirmation proceedings and then the declaratory judgment proceedings—and to do so, had to apply the laws of the United States. As has been seen, no statute authorized or required the Indiana court to limit its function to something less than a judicial one required by the con-

stitutional dimensions of Article III. Likewise, Order No. 238 did not impair the judicial power of the Indiana court granted to it by 28 U.S.C. § 1332, 9 U.S.C. §§ 1-14, and Article III of the Constitution.

Suffice it to say that the Indiana court did not in any way "circumscribe" the appropriate jurisdiction of the reorganization court "as to the enforcement of an arbitration award which was subsequently confirmed by the Indiana Court" as concluded by the Seventh Circuit (App. 77). The reorganization court had a function *and* the Indiana court had a function. The Seventh Circuit's decision to the contrary is wrong.

3. The Indiana Court's Declaratory Judgment Correctly Decided That the Confirmation Judgment Was Res Judicata on Penn Central's Rail Act Defense.

Any claim by Penn Central that the arbitration award was invalid or nonenforceable under the provisions of the Rail Act ought to have been made to the Indiana court in the confirmation proceedings which had the exclusive jurisdiction to decide the question of the liability of Penn Central under the laws of the land. All legal defenses to the validity of the award had to be raised in the confirmation proceedings in Indiana. Defenses not raised were waived. Therefore, the confirmation judgment upon the award was res judicata between the parties and estopped Penn Central from raising the Rail Act defense to its liability for rail line restoration under the award when the matter was presented by Amtrak to the reorganization court for satisfaction. That is Amtrak's position, pure and simple, and that position leads inescapably to the conclusion that the declaratory judgment was perfectly correct. The Seventh Circuit cited no authority to the contrary in part IV of its decision, except to emphasize the "limited purpose" of the confirmation proceedings to see that the arbitration award was a "proper

award and that the arbitrators acted honestly and did not exceed their powers." (App. 78). Amtrak respectfully disagrees.

The confirmation judgment should have put an end to Penn Central's Rail Act defense. The federal policy behind the Arbitration Act was to promote arbitration of disputes and to eliminate the need for litigation on the merits, thereby easing court congestion and effectuating the parties' intention to avoid expensive and time-consuming litigation. *World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F.2d 362, 365-66 (2d Cir. 1965); and *Galt* v. *Libbey-Owens-Ford Glass Co.*, 376 F.2d 711, 714 (7th Cir. 1967). By clarifying the legal effect of its confirmation judgment upon the arbitration award, the Indiana court by the declaratory judgment made its determinations more certain and reduced the risk of renewed and prolonged litigation on the question of the validity and appropriateness of the arbitration award—a question which should have been put to rest and settled in Indianapolis and ought not again have been raised in Philadelphia.

The doctrine of res judicata was explained by this Court in *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719 (1948):

> "* * * The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but *as to any other admissible matter which might have been offered for that purpose.*' *Cromwell* v. *County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195. The judgment puts an end to the cause of action, which cannot again be brought into litigation be-

tween the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. • • •'' (Emphasis added).

The fact is that both Penn Central and the reorganization court knew full well that the place for raising the Rail Act defense to the arbitration award was before the confirming Indiana court under the Federal Arbitration Act. There is no conflicting law on that. That is the law. Under the Act, the confirming judge may vacate an award under 9 U.S.C. § 10(d) ''[w]here the arbitrators exceeded their powers.''[19] If the Rail Act prevents Penn Central from causing the restoration of the tracks which Penn Central abandoned to weeds and weather or relieves Penn Central from past contract defaults, that is a legal ground for vacating the award. As such it had to be raised in the confirmation proceedings. The dissenting arbitrator noted that fact. Counsel for Amtrak told the reorganization court precisely that when counsel argued that the reorganization court had no right to interfere with the confirmation proceedings in Indiana:

> ''THE COURT: • • • It [the restoration ordered by the arbitrators] obviously can't take effect until after conveyance date [of the rail lines to ConRail under the Rail Act], and at that point the whole ball game has changed.
>
> ''Now what is your response to that?

[19] In *Wilko* v. *Swan*, 346 U.S. 427, 436-37, 74 S.Ct. 182, 187 (1953), the Court implied that an award by an arbitrator disregarding the applicable securities law would constitute a ground for vacation under § 10 (d). Justice Frankfurter's dissent emphasized that "[a]rbitrators may not disregard the law." 346 U.S. at 440, 74 S.Ct. at 189. While it is now clear that an arbitration award will not be vacated for a mistaken interpretation of law, to ignore the applicable law is another matter. To "manifestly disregard" the law may compel vacation. *See Sobel* v. *Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972). In short, awards in violation of the law are not enforceable and Penn Central had to concede the award was perfectly valid under the Rail Act and all other laws of the land when Penn Central agreed to the entry of the confirmation judgment.

> ''MR. VALENTINE: My response to that is that is a proper question for the judge in Indiana, and he is equally able to decide that question as this court. • • •''
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> • • •
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> ''• • • We say we are proceeding in Indiana in the face of the RRRA [Rail Act], and we say this is an Act which should be brought to the attention of the court [in] Indiana, which is proceeding with the original jurisdiction in this case. • • •''

The reorganization court never stopped the confirmation proceedings or the declaratory judgment proceedings before the Indiana court.

It is well established that a petition to confirm an arbitration award requires the opposing party to bring forward his objections and grounds for vacating the award in the confirmation proceedings. He cannot interpose a ''no objection'' and then later seek a vacation of the award in another proceeding. In *The Hartbridge*,[20] 57 F.2d 672, 673 (2d Cir. 1932), *cert. denied sub nom. Munson S.S. Line* v. *North of England S.S. Co., Ltd.*, 288 U.S. 601, 53 S.Ct. 320 (1933), the Second Circuit stated:

> ''• • • Upon a motion to confirm the party opposing confirmation may apparently object upon any ground which constitutes a sufficient cause under the statute to vacate, modify, or correct, although no such formal motion has been made. • • • As we understand the statute a motion to confirm puts the other party to his objections. He cannot idly stand by, allow the award to be confirmed and judgment thereon entered, and then move to vacate the award just as though no judgment existed. • • •'' 57 F.2d at 673.

[20] The Seventh Circuit attempts to distinguish *The Hartbridge* (App. 76) by saying that Penn Central was not trying to vacate the award when it raised the Rail Act in the reorganization court as a complete defense to the validity of the award and the confirmation judgment. Regardless of what word is used to describe Penn Central's pleadings, the effort was unmistakably to vacate the award, erase all liability of Penn Central and nullify the confirmation judgment.

More recently, in *Brown* v. *Bridgeport Rolling Mills Co.*, 245 F.Supp. 41 (D. Conn. 1965), the district court relied upon and quoted *The Hartbridge* in concluding that:

> "* * * in a proceeding to confirm an award not only *may* an opposing party object upon grounds which might be urged in support of a proceeding to vacate an award; he *must* do so, or he waives his right to do so." 245 F.Supp. at 45. (Court's emphasis).

Penn Central was required to raise its Rail Act contentions in Indiana before the entry of judgment or it waived its right to do so. *See Flynn* v. *St. Bd. of Chiro. Exam.*, 418 F.2d 668 (9th Cir. 1969); *Meyer* v. *Lavelle*, 389 F.Supp. 972, 976 (E.D. Pa. 1975); and *County of Lancaster* v. *Philadelphia Electric Co.*, 386 F.Supp. 934, 937-38 (E.D. Pa. 1975). *In accord, In Re Universal Display & Sign Co.*, 541 F.2d 142, 144 (3d Cir. 1976). Even a consent judgment is entitled to res judicata effect. *See Wallace Clark & Co.* v. *Acheson Industries, Inc.*, 532 F.2d 846, 848 (2d Cir.), *cert. denied*, — U.S. —, 96 S.Ct. 2177 (1976) and the cases cited therein.

Thus, Penn Central cannot under the law have a chance for a second bite at the apple, when it gave up its opportunity to take the first bite. The confirmation judgment is res judicata on the Rail Act defense and the Indiana court's declaratory judgment is correct. This Court should grant a writ of certiorari and reverse the Seventh Circuit's decision, with the direction to reinstate the Indiana court's declaratory judgment. If that occurs, the proper boundary between the duties of the Indiana court and the reorganization court will have been marked and the reorganization court can proceed with its job of fitting Amtrak's confirmation judgment into the administration of the estate and deciding how and when Amtrak's legal rights under a judgment of a United States district court will be recognized.

CONCLUSION

The legal issues here are novel and deserve the attention of the Supreme Court, not only because those issues touch the life blood of Amtrak, but also because of the jurisdictional questions implicit in the Seventh Circuit's decision. This case is of utmost importance to the future of Amtrak in the Midwest which has been deprived of the intercity rail passenger service contemplated by Congress in the Amtrak Act, and also in other parts of the nation where Penn Central operated.

Amtrak believes the Seventh Circuit erred for three basic reasons: (1) the Indiana court did have declaratory judgment jurisdiction; (2) the Indiana court's entry of the declaratory judgment did not interfere with the proper jurisdiction of the reorganization court; and (3) the declaratory judgment correctly decided that the confirmation judgment barred Penn Central's Rail Act defense. The Seventh Circuit's contrary decision sanctions such a departure from the accepted and usual course of judicial proceedings that this case calls for an exercise of the Court's power of supervision. Accordingly, a writ of certiorari should issue to review the decision of the Seventh Circuit.

Respectfully submitted,

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Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1829

NATIONAL RAILROAD PASSENGER CORPORATION,
Plaintiff-Appellee,

v.

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. IP 76-274-C — **William E. Steckler**, *Chief Judge.*

ARGUED OCTOBER 29, 1976—DECIDED FEBRUARY 15, 1977

Before HASTINGS, *Senior Circuit Judge,* MOORE, *Senior Circuit Judge**, and SPRECHER, *Circuit Judge.*

HASTINGS, *Senior Circuit Judge.*** We are concerned here with various issues arising out of an order by the district court,[1] entered on March 24, 1976, confirming an arbitration award compelling the restoration of certain

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* The Honorable Leonard P. Moore, Senior United States Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

** This opinion was written and approved by the panel and sent to Midwest Law Printing Co., Inc., for printing prior to Judge Hastings' death on February 7, 1977.

[1] United States District Court for the Southern District of Indiana, Indianapolis Division, the Honorable William E. Steckler, Chief Judge, presiding.

tracks by Penn Central Transportation Company (Penn Central); and also with the judgment entry and memorandum order by the district court entered on June 25, 1976, granting the motion of the National Railroad Passenger Corporation (Amtrak) for summary judgment in a declaratory judgment action, thereby enforcing the district court's previous order of confirmation. Penn Central has appealed.

I

For purposes of clarity we first mention three relevant substantive legislative enactments of the Congress:

1. The Bankruptcy Act of 1898, which was amended in 1933 by adding Section 77 thereto, which provided for the reorganization of railroads. Section 77 furnished the structural framework by which Penn Central commenced its reorganization proceedings before the United States District Court for the Eastern District of Pennsylvania (Reorganization Court). Bankruptcy Act of 1898, as amended, 11 U.S.C. § 205, Reorganization of Railroads.

2. The Rail Passenger Service Act of 1970, 45 U.S.C. § 501, *et seq.*, which created the National Railroad Passenger Corporation, a for-profit corporation, pursuant to the District of Columbia Business Corporation Act, to provide intercity rail passenger service over a designated basic national rail passenger system, as a private enterprise, but with federal financial assistance. The need for such a corporation arose from the specific Congressional finding that a modern, efficient, intercity railroad passenger service was a necessary part of a balanced transportation system and was in the national interest. The National Railroad Passenger Corporation (Amtrak) was authorized to contract with each railroad operating passenger trains in a basic system, for use by Amtrak of railroad tracks, facilities and services "on such terms and conditions as the parties may agree." *See* 45 U.S.C. § 562(a). Subsequent amendments to 45 U.S.C. § 501, *et seq.*, have merely supplemented the basic legislation. See Amtrak Improvement Act of 1974 (Public Law 93-496, October 28, 1974, 88 Stat. 1527). The Amtrak Improvement Act of 1974, *supra*, amended the name of the Railroad Passenger Service Act of 1970 to become the Rail Passenger Service Act. See Section 12 of the 1974 amendment. The Act is referred to by the parties and will herein be referred to simply as the "Amtrak Act."

3. The Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701, *et seq.* (Public Law 93-236, January 2, 1974, 87 Stat. 986), referred to by the parties and by our court as the "Rail Act," provided for the establishment of the United States Railway Association and the Consolidated Rail Corporation (ConRail), both with enumerated powers and duties. The United States Railway Association was created as a Government corporation, incorporated under the District of Columbia Nonprofit Corporation Act, and was empowered to prepare and implement a Final System Plan. ConRail was created as a for-profit corporation, incorporated under the laws of a state, with its principal office in Philadelphia, Pennsylvania. Pursuant to Section 742, ConRail was to acquire, operate, rehabilitate and maintain efficient rail service over the rail lines designated in the Final System Plan.

Amtrak brought the instant declaratory judgment action on May 5, 1976, pursuant to 28 U.S.C. §§ 2201 and 2202, alleging both diversity of citizenship and federal question jurisdicton. The relief sought was an order to show cause upon Penn Central why a quarterly work schedule for the restoration of 360 miles of Penn Central tracks had not been submitted to Amtrak on May 3, 1976, as required by the order of confirmation and the arbitration award referred to earlier. This declaratory action was brought in the United States District Court for the Southern District of Indiana, Indianapolis Division.

Amtrak initiated arbitration proceedings on August 18, 1972, in the Reorganization Court, pursuant to a broad arbitration clause entered into by the parties in The National Railroad Passenger Corporation Agreement of April 16, 1971. This agreement is referred to by the parties as the "Basic Agreement," and was mandated by Section 561(a) of the Amtrak Act, 45 U.S.C. § 501, *et seq.*, whereby Amtrak was directed to contract with the railroad "to relieve the railroad of its entire responsibility for the provision of intercity rail passenger service" under "such terms and conditions as necessary to permit the Corpora-

tion [Amtrak] to undertake passenger service on a timely basis."

Under the terms of the Basic Agreement, Amtrak undertook to assume the intercity rail passenger responsibilities of the Trustees of Penn Central and all other contracting railroads, and Penn Central undertook to render certain services to Amtrak and to maintain its rail lines used by Amtrak at an agreed upon "level of utility."

Under Article Six of the Basic Agreement any "claim or controversy" between Amtrak and Penn Central was to be resolved by binding arbitration in accordance with the provisions of The National Railroad Passenger Corporation Arbitration Agreement separately contracted to by the parties on April 16, 1971. Referred to by the parties as the "Arbitration Agreement," Section 4.2 provides:

> "• • • [A]ny arbitration award hereunder made by a *majority* of the members of any Arbitration Panel shall be binding upon the parties thereto. Any arbitration award hereunder shall declare the rights of the parties thereto and *may make awards of money, or enjoin or otherwise operate in such a way as to require specific performance by a party of any act or obligation.*" (Emphasis added.)

Section 4.3 of the Arbitration Agreement further provides:

> "Judgment may be entered upon any arbitration award hereunder • • • in any United States District Court."

A dispute arose between Amtrak and Penn Central concerning the "level of utility" of about 360 miles of certain rail lines of Penn Central connecting Kankakee, Illinois, with Louisville, Kentucky, and Cincinnati, Ohio, via Indianapolis, Indiana, under the Basic Agreement of 1971. Amtrak's claim that Penn Central had defaulted in its obligation to maintain the track was duly submitted to the National Arbitration Panel.[2]

[2] The National Arbitration Panel is a special arbitration panel created in Article One of the Arbitration Agreement of April 16, 1971. The panel is composed of three arbitrators representing both railroad and Amtrak interests, and convenes in Washington, D. C. The jurisdiction of the panel is limited to "claims or controversies" that may arise under the Basic Agreement.

After the parties submitted extensive written memoranda and oral testimony was heard, the arbitration was interrupted by an "Emergency Order" of the Federal Railroad Administration on August 1, 1974. This emergency order terminated Amtrak's service on the above-mentioned Penn Central line because the track had been found to be "in an unsafe condition," creating "an emergency situation involving a hazard of death or injury to persons affected by the use thereof."

Without objection from Penn Central and in accordance with its rules, the Panel began additional hearings, accepted a revised request for an award from Amtrak, and received additional evidence on September 11, September 24, September 29 and December 16, 1975, and January 20, 1976. Thereafter, on February 3, 1976, the National Arbitration Panel issued a written award in NAP Case No. 11, *In Re: Level of Utility,* with the following declarations and awards:

First, the Panel declared that Amtrak had a contract right to have the Penn Central rail lines connecting Kankakee with Cincinnati and with Louisville via Indianapolis kept "at no less than the level of utility" which existed on May 1, 1971.

Second, the Trustees of Penn Central had defaulted in keeping this bargain.

Third, the Trustees were ordered to "cause" the restoration of these lines to their proper condition by January 1, 1978, in accordance with a "Panel Program," which provided, *inter alia,* for a detailed work schedule to be submitted to Amtrak within ninety days of this award.

The estimates of the cost of these repairs ranged from 22 million dollars, based upon independent evaluation, to 11 million dollars, estimated by Penn Central using its own employees. Costs were estimated in terms of October 1975. The Panel's award further provided that Penn Central would bear the entire financial burden of the repairs.

A dissenting opinion was handed down by Panel Member Johnson, recommending the denial of Amtrak's claim for specific performance. He noted that in 1971 the rail lines were already in a state of deterioration and that the

present award would upgrade the lines beyond the May 1, 1971, level at the total expense of Penn Central. Although conceding that Penn Central had in fact defaulted by permitting the lines to deteriorate generally since 1971, Arbitrator Johnson stated that, upon the record, the issue of what constituted maintenance on the one hand and rehabilitation on the other, had not been answered. Johnson, therefore, concluded that the inequity of ordering Penn Central to pay the entire cost of the "Panel Program" was an arbitrary interpretation of Section 4.2, *supra*, and suggested that the expense of the program be shared equally.

On February 4, 1976, pursuant to 9 U.S.C. § 9, United States Arbitration Act, and Section 4.3 of the Arbitration Agreement, *supra*, Amtrak petitioned the United States District Court for the Southern District of Indiana, Indianapolis Division, for confirmation of the arbitration award. However, on February 17, 1976, Penn Central petitioned the Reorganization court in the Eastern District of Pennsylvania for an order requiring Amtrak to show cause "why it should not be required * * * to comply with the provisions of Order No. 238 and, pending the filing of said petition, why it should not be enjoined from proceeding further in the [Confirmation Proceeding]."

In authorizing the Trustees of Penn Central to enter into the Basic Agreement with Amtrak, the Reorganization Court in Order No. 238, in pertinent parts, stated:

> "1. The Trustees are authorized to execute a contract with Amtrak in substantially the form submitted to the Court at the hearing, PROVIDED, however, * * * (b) that whenever any matter is resolved by arbitration pursuant to the Main Agreement or the Arbitration Agreement, the decision shall be submitted to this court for review and approval before becoming finally binding upon the Trustees or the Debtor, during the pendency of these reorganization proceedings.
>
> * * * *
>
> "4. The Court reserves jurisdiction over said contract for the purpose of directing such actions and granting such further relief as may be necessary to protect the interests of the Debtor's Estate."

The Reorganization Court, however, never ruled on Penn Central's February 17, 1976, petition to show cause, because the Trustees of Penn Central subsequently consented to the entry of a judgment in the Indiana Court. The consent of the Trustees, and by implication that of the Reorganization Court, was induced by the assurances of counsel for Amtrak that it was only attempting to liquidate its claim in the Indiana court, and that Amtrak was well aware of and, in fact, accepted the primary jurisdiction of the Reorganization Court.

Language from Amtrak's memorandum, as it appears in the record in the Reorganization Court, reads:

> "any judgment entered by the Indianapolis District Court upon Amtrak's Petition to Confirm will not serve to make the award of the National Arbitration Panel finally binding upon the Trustees. To become finally binding, execution on the judgment would be necessary. Yet execution in any court other than this Reorganization Court would so manifestly interfere with the Court's exclusive jurisdiction to control the administration of the estate that it would be impossible to support in law or fact. Therefore, in order for Amtrak to make the award *finally binding* upon the Trustees, the entire matter will eventually have to be submitted in the bankruptcy proceedings * * * The mere fact that the arbitration claim has been reduced to a judgment will not prevent this Court from making an inquiry since the merger of a claim into a judgment does not change its nature as far as provability is concerned."

Thereafter, the Trustees consented to the entry of judgment in the Confirmation Proceedings in Indiana, based upon the above assertions in the Reorganization Court, that the Indiana Court would review the arbitration proceedings "to see that the award was a proper award and that the arbitrators acted honestly and did not exceed their powers." Thereafter, the Indiana Court entered an Order of Confirmation on March 24, 1976.

On April 9, 1976, Amtrak petitioned the Reorganization Court for enforcement of the now confirmed Arbitra-

tion Award. Penn Central, thereafter, filed an answer to the petition for enforcement, asserting that the award could not be enforced against Penn Central because the rail tracks in question had been conveyed to ConRail pursuant to the Rail Act, and, therefore, Penn Central's obligation to restore the tracks was terminated. Amtrak secured an indefinite postponement of its petition in the Reorganization Court, returned to the Indiana Court and filed its instant declaratory judgment action in Indiana.

During the arbitration proceedings between the litigants, Congress supplemented Section 77 of the Bankruptcy Act with the Rail Act, as herein earlier set out.[3] The Rail Act, like the Amtrak Act, was designed to revitalize the nation's rail system, and the rail lines in issue here were designated for transfer to ConRail. Penn Central contends that such a transfer to ConRail relieved it of the responsibility to restore the 360 miles of track, and that, in any event, the issue was one in the exclusive jurisdiction of the Reorganization Court pursuant to its Order 238, *supra*.

At the center of this controversy is the Indiana Court's conclusion of law that:

> "5. The judgment upon the arbitration award of the National Arbitration Panel entered by this Court on March 24, 1976, is *res judicata* concerning and is a conclusive bar against any further legal claims which may be made by the Trustees that:
>
> (a) the award of the National Arbitration Panel and judgment of this Court entered thereon is invalid and nonenforceable because of the provisions of the Regional Rail Reorganization Act of 1973; or
>
> (b) the rehabilitation of the rail lines which are the subject of this controversy at the sole

[3] As the Supreme Court recognized in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 153 (1974):

> "Congress, in enacting these provisions, clearly intended to legislate pursuant to the bankruptcy power. The Rail Act, like § 77 of the Bankruptcy Act, which the Rail Act supplements, merely 'advances

> cost of the Trustee is unreasonable or inequitable in view of the April 1, 1976, transfer of these lines to ConRail; or
>
> (c) the judgment should not be carried out because of any facts, circumstances or legal defenses which could have been or ought to have been asserted during the confirmation proceedings as a ground for vacating the award under the provisions of Section 10 of the Federal Arbitration Act or for modifying or correcting this award under Section 11 of the Federal Arbitration Act, 9 U.S.C. §§ 10 and 11."

It is quite clear to us that the Indiana Court intended to and did set up its judgment upon the arbitration award as a final and conclusive judgment, holding that it was *res judicata* concerning the arbitration award and a complete bar to further consideration of the claims set out in subparagraphs (a), (b) and (c) above.

At this point it appears relevant to report a late happening. On September 30, 1976, Judge Fullam of the Reorganization Court entered Order No. 2569 which *denied* Amtrak's petition for an order authorizing, instructing and directing the Trustees of Penn Central to carry out the judgment of the Indiana District Court to restore or cause to be restored certain rail lines in Indiana. Judge Fullam further enjoined Amtrak, pursuant to Order 238, *supra*, as follows:

> "The Petitioner, National Rail Passenger Corporation ('Amtrak'), is enjoined from instituting or furthering any legal proceeding for the assertion or enforcement against the Trustees or the estate of the Debtor of any alleged obligation or liability for track maintenance or improvement, in any jurisdiction or before any tribunal except this Court, (or, if appropriate, in the Special Court), or as otherwise ordered by this Court. *Nothing in this order shall be deemed to apply to the appeal now pending in the Circuit Court of Appeals of the Seventh Circuit, nor*

another step in the direction of liberalizing the law on the subject of bankruptcies,' . . . ." (Citations omitted.)

to any appeal from this or any other Order of this Court." (Emphasis added).[4]

On October 1, 1976, Judge Fullam handed down a Memorandum and Order with respect to his Order No. 2569. This appears in Appendix F of Amtrak's brief filed here in the instant appeal. Judge Fullam, *inter alia,* gave an analysis of the procedural history of this proceeding with respect to the Indiana Court. He fully considered the effect of the Rail Act as it related to ConRail. He paid his respects to Amtrak's intentions, absent the injunctive restrictions hereinabove set out, to return to the Indiana Court, or perhaps other courts in an attempt to obtain a further expansion of the confirmed arbitrator's award, or perhaps in some other fashion to obtain "reparations." Judge Fullam, stating that he was unable to fully understand the legal theory or basis for Amtrak's attempts, held that the injunction should remain in effect.

II

We first consider whether the Indiana Court had jurisdiction by declaratory judgment or any other judicial means to circumscribe the jurisdiction of the Pennsylvania Reorganization Court, as to the enforcement of an arbitration award which was subsequently confirmed by the Indiana Court.

At the outset it seems quite clear to us that in a railroad reorganization, the power to resolve all disputes involving the estate and to determine the enforceability and status of all claims is vested exclusively in the Reorganization Court. See the injunctive powers in Section 77(j) of the Bankruptcy Act, 11 U.S.C. § 205(j). *Baker v. Gold Seal Liquors,* 417 U.S. 467, 477 (1974), Mr. Justice Stewart concurring. *Baker* was a Penn Central reorganization case in which the Seventh Circuit was reversed. In the *New Haven Inclusion Cases,* 399 U.S. 392 (1970), a similar question was presented concerning a railroad reorganization under Section 77. Two groups of creditors sought relief in differ-

[4] Amtrak has in fact appealed from Judge Fullam's Order No. 2569, as we were advised by counsel during oral argument. This appeal is now pending before the Court of Appeals for the Third Circuit.

ent tribunals. The two courts reached different decisions as to the proper compensation. The Supreme Court on review of the proceedings, first addressed itself to the conflict of jurisdiction and found that it rested exclusively in the Reorganization Court. *New Haven Cases* at 426, 428-429.

We find that the plenary and exclusive jurisdiction of the Reorganization Court to determine issues that directly affect and concern the reorganization, including the enforcement of the Arbitration Award, is exemplified by *In Re New York, New Haven and Hartford Railroad Co.,* 2 Cir., 457 F.2d 683 (1972), *cert. denied, Smith v. Baker,* 409 U.S. 890, *reh. denied,* 409 U.S. 1019 (1972). The court there was presented with the "conflict of jurisdiction between two federal courts each claiming jurisdiction to affect interests in certain property over which, under a literal reading of § 77(a), one federal court has 'exclusive jurisdiction.' " 457 F.2d at 687.

The court held that the New Haven Railroad Reorganization Court was without jurisdiction to establish a lien against the Penn Central properties in favor of the New Haven. The court further held that the exclusive jurisdiction to determine how claims or rights should be enforced in the Penn Central reorganization rested solely in the Penn Central Reorganization Court. The court was careful to stress the Congressional purpose behind the enactment of Section 77 in general and the necessity to award the overlapping jurisdiction of numerous courts. To hold otherwise "would tend greatly to formulate conflicts between coordinate courts • • •." 457 F.2d at 688-689. (Citations omitted.)

This is not to say that the Reorganization Court may not delegate to other forums the resolution of factual disputes while retaining jurisdiction in itself over the enforcement of factual determinations made elsewhere. In its Order No. 771, the Reorganization Court recognized that the merits of a contractual dispute are clearly severable from the reorganization proceeding itself, so long as that court retains to itself the jurisdiction to decide at a later stage, if necessary, all issues concerning the implementation of any relief which may be granted in the state court action.

In the *New Haven Inclusion Cases,* 399 U.S. at 433-434, the Supreme Court gave its imprimatur to such a practice.

This practice is further evidenced by the Reorganization Court's authorization to the Trustees to enter into the Basic Agreement with Amtrak, which contained a provision for the arbitration of disputes arising from the interpretation of the Agreement, and retaining to itself jurisdiction over the enforcement of any arbitration awards (Order No. 238).

In support of their motion for summary judgment in the Indiana Court, Amtrak relied upon *The Hartbridge,* 2 Cir., 57 F.2d 672, 673 (1932), *cert. denied, Munson S. S. Line v. North of England S. S. Co., Ltd.,* 288 U.S. 601 (1933), to support their position that because the Trustees have had their "day in court," they could not then seek review in the Reorganization Court of matters previously litigated. *The Hartbridge,* however, only goes so far as to say that where a party to an arbitration award has not opposed a proceeding to confirm it, that party cannot later move to vacate the award. Here the Trustees did not seek to have the award vacated. The Trustees say they were satisfied that the arbitrators acted properly in confining their inquiry to the determination of the Trustees' obligations under the agreement, leaving to the Reorganization Court the enforcement of the award. The analogy drawn between the decision of the court in *Hartbridge* and the instant case is misplaced.

Of direct interest here is *Kalb v. Furstein,* 308 U.S. 433 (1940). *Kalb* arose under the provisions of Section 75 of the Bankruptcy Act, 11 U.S.C. § 203 (the Frazier-Lemke Act). Kalb, a farmer, filed a petition for the composition and extension of time to pay his debts. Two mortgagees began foreclosure proceedings against Kalb's Wisconsin farm while the petition was pending. Kalb's land was sold by the sheriff under a judgment of foreclosure. Kalb took no steps to stay the foreclosure or the action to enforce it. On appeal from the judgment of the Supreme Court of Wisconsin in favor of the mortgagees, the jurisdiction of the Wisconsin Supreme Court to proceed as it did was presented to the Supreme Court of the United States. *Id.* at 436.

Speaking for the Court in *Kalb,* Mr. Justice Black wrote, *inter alia,* "The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. * * * We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings * * * without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending." *Id.* at 439-440.

It seems quite clear to us that the Indiana Court was without jurisdiction by declaratory judgment, or other judicial means, to circumscribe the jurisdiction of the Pennsylvania Reorganization Court as to the enforcement of an arbitration award which was subsequently confirmed by the Indiana Court, and we now so hold.

III

Penn Central questions whether the Indiana Court had before it a "controversy" which would give it jurisdiction under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, to determine the effect of its earlier order. In short, Penn Central contends that the declaratory judgment here is an advisory opinion and a nullity under the Declaratory Judgment Act.

In view of our disposition of this appeal we shall assume that there was a "controversy" before the Indiana Court which enabled it to proceed. Whether the actions it took were proper is quite another question.

IV

We next proceed to the question of whether the Indiana Court was correct in holding that its earlier confirmation order was *res judicata* in the proceedings which earlier had been commenced in the Reorganization Court to enforce the confirmed order.

As hereinabove indicated in Part I of this opinion, the Indiana Court expressly held that its judgment of March

24, 1976, upon the arbitration award was a final and conclusive judgment and was *res judicata* concerning and was a conclusive bar against any further legal claims which may be made by the Trustees and explicitly set out the nature of the claims so barred.

Amtrak's complaint sought a declaratory judgment from the Indiana Court as to whether issues raised in the Trustees' answer to Amtrak's petition in the enforcement proceedings were barred by *res judicata*.

We are unable to find any precedent, and none has been cited to us, for referring back to the court of first adjudication (the Indiana Court) the question of whether its judgment is *res judicata* in another court, here, the Reorganization Court. The law is to the contrary. That is, in this case the Reorganization Court has the responsibility to decide whether the issues before it are barred by the prior adjudication in the Indiana Court. *Cf. Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964), citing *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922).

The Trustees left no doubt as to their position and the record clearly shows that the Confirmation Proceeding had the *limited purpose* to review the arbitration proceedings "to see that the award was a proper award and that the arbitrators acted honestly and did not exceed their powers." To that limited extent only the Indiana Court acted within its powers. *See* 9 U.S.C. §§ 9, 10 and 11.

We find nothing in the Act of Congress that expresses any intent that the Reorganization Court was to be divested of its plenary powers in preference to the declaratory judgment power of the Indiana Court.

In passing, we note here that the Arbitration Panel held that it was without jurisdiction to decide the ConRail issue. The issue was not raised before the Indiana Court. Yet, Amtrak urged and the Indiana Court held that the Trustees could not raise the issue of the transfer of the subject rail lines to ConRail.

We are therefore compelled to the conclusion that the Indiana Court erred in finding that the enumerated bars against the Trustees were *res judicata* of the matters set out in its Conclusion of Law No. 5, *supra*, and we so hold.

IN SUMMARY

In view of the foregoing, we hold that the Declaratory Judgment of the Indiana Court was an improper exercise of its limited jurisdiction and was wrong on the merits. Accordingly, the judgment of the Indiana Court is reversed. This case is remanded to the Indiana Court with directions to vacate its declaratory judgment.

The issues hereinabove discussed are within the exclusive jurisdiction of the Pennsylvania Reorganization Court and it may now proceed therewith.

REVERSED.
REMANDED WITH DIRECTIONS.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NATIONAL RAILROAD PASSENGER CORPORATION, *Plaintiff,* v. ROBERT W. BLANCHETTE, RICHARD C. BOND, JOHN H. MCARTHUR, Trustees of the Property of PENN CENTRAL TRANSPORTATION COMPANY, *Defendants.*	CIVIL ACTION NO. IP76-274-C

JUDGMENT ENTRY

This action came before the Court for the Entry of Judgment in favor of the plaintiff, National Railroad Passenger Corporation, and against the defendants, Robert W. Blanchette, Richard C. Bond, and John H. McArthur, Trustees of the Property of Penn Central Transportation Company.

It is ORDERED, ADJUDGED AND DECREED that the plaintiff's Motion for Summary Judgment is granted and that judgment is hereby entered in favor of the plaintiff, National Railroad Passenger Corporation, and against the defendants, Robert W. Blanchette, Richard C. Bond, and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, on the plaintiff's complaint in accordance with the Memorandum Order, Findings of Fact and Conclusions of Law entered simultaneously herewith.

Date: June 25, 1976.

WILLIAM E. STECKLER

Chief Judge, United States District Court for the Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NATIONAL RAILROAD PASSENGER CORPORATION, *Plaintiff,* v. ROBERT W. BLANCHETTE, RICHARD C. BOND, JOHN H. McARTHUR, Trustees of the Property of PENN CENTRAL TRANSPORTATION COMPANY, *Defendants.*	CIVIL ACTION NO. IP76-274-C

MEMORANDUM ORDER, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This cause came before the Court for ruling upon pending motions. A Motion for Summary Judgment and a Motion for Expedited Consideration were filed on May 28, 1976, by the plaintiff, National Railroad Passenger Corporation ("Amtrak"). In support of its Motion for Summary Judgment, Amtrak submitted the affidavit with exhibits of Charles T. Richardson, one of Amtrak's attorneys in this action, and a brief of points and authorities in support of the Motion for Summary Judgment. The defendants ("Trustees") filed a memorandum in opposition. In support of its Motion for Expedited Consideration, Amtrak submitted the affidavit of H. L. Bishop, an employee of the firm of Sverdrup & Parcel and Associates, Inc. On June 14, 1976, the Trustees filed their Motion to Dismiss Complaint, with a memorandum and a supplemental memorandum in support. Amtrak filed a memorandum in opposition. On June 14, 1976, the Trustees also filed a Motion for Prior Hearing of Defendants' Motion to Dismiss, In Advance of Plaintiff's Motion for Summary Judgment. On June 17, 1976, the Trustees filed a Cross-Motion for Summary Judgment. On June 18, 1976, the Court heard oral argument on all pending motions.

Having considered Amtrak's motions and the opposition of the Trustees, having considered the Trustees' motions and the opposition of Amtrak, and having considered the

pleadings, entries, evidence and arguments in this action, as well as in the consolidated arbitration confirmation actions in this Court entitled "National Railroad Passenger Corporation, Petitioner, vs. Robert W. Blanchette, Richard C. Bond, and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Respondents," Cause No. IP76-76-C ("Penn Central case"), and "National Railroad Passenger Corporation, Plaintiff, vs. The Chesapeake and Ohio Railway Company, Defendant; and State of Indiana, Otis R. Bowen, Governor, Theodore L. Sendak, Attorney General, Public Service Commission of Indiana, Intervenors," Cause No. IP74-420-C ("C & O case"), the Court makes the following rulings: The Motion to Dismiss Complaint of the Trustees is OVERRULED. The Cross-Motion for Summary Judgment of the Trustees is OVERRULED. The Motion for Summary Judgment of Amtrak is GRANTED. Amtrak's Motion for Expedited Consideration and the Trustees' Motion for Prior Hearing are moot and the Court need not rule thereon. The rulings herein announced and the Findings of Fact and Conclusions of Law below settle the controversies between the parties in this lawsuit, principally the dispute concerning the ambiguity in and the meaning of the Court's judgment entered in the Penn Central case on March 24, 1976.

The Court makes the following findings of Fact and Conclusions of Law pursuant to Rule 56 of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. Amtrak is a corporation organized and existing under the laws of the District of Columbia pursuant to 45 U.S.C. §§ 501, *et seq.* The Trustees are Trustees in Bankruptcy of the Property of the Penn Central Transportation Company ("Penn Central") pursuant to 11 U.S.C. § 205, and the orders of the United States District Court for the Eastern District of Pennsylvania ("Bankruptcy Court"). Penn Central is a corporation organized and existing under the laws of Pennsylvania.

2. Amtrak's Petition to Confirm Arbitration Award in the Penn Central case was filed in this Court on February

4, 1976, under the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, and was served upon a representative of the Respondents therein on February 6, 1976. That Petition to Confirm asked the Court to confirm an award of the National Arbitration Panel in favor of Amtrak and against the Trustees entered on February 3, 1976. A copy of the award was attached to the Petition to Confirm. The Court enlarged the Trustees' time to respond to Amtrak's Petition to Confirm to March 10, 1976. A request by the Trustees for an additional enlargement of time was never acted upon by this Court, but the Trustees responded on March 24, 1976. See paragraph 5 below.

3. On February 17, 1976, the Bankruptcy Court entered Order No. 2215 at the request of the Trustees. The Order directed Amtrak to show cause why it had not petitioned the Bankruptcy Court to confirm the arbitration award issued by the National Arbitration Panel in the Bankruptcy Court or petitioned the Bankruptcy Court for leave to file the Penn Central case in this Court. A copy of Order No. 2215 was attached to Mr. Richardson's affidavit as Exhibit B.

4. In response to Order No. 2215, Amtrak, the Trustees and other interested parties appeared by counsel before the Bankruptcy Court on March 18, 1976. A copy of the transcript of that hearing was attached to Mr. Richardson's affidavit as Exhibit C.

5. On March 24, 1976, the Trustees filed in this Court a Response to Amtrak's Petition to Confirm. On that same day, counsel for all the parties in both the Penn Central case and the C & O case appeared before this Court in chambers. There was a general discussion by counsel with the Court concerning the status of the Penn Central case and the C & O case and the various issues and defenses in the cases. Counsel for the Trustees reported to the Court that the Trustees had no objection to the confirmation of the arbitration award in favor of Amtrak by the National Arbitration Panel, provided that any order of confirmation was in the form attached to the Trustee's Response filed earlier. At the close of the meeting with this Court, the Court signed the Order of Confirmation Concerning NAP Case No. 11; In Re: Level of Rail Utility Final Decision

and Award as to Penn Central, and the Order of Confirmation Concerning NAP Case No. 29; In Re: Chicago—Cincinnati Service Decision and Award.

6. On April 9, 1976, Amtrak filed in the Bankruptcy Court its Petition for Order Authorizing, Instructing and Directing the Trustees to Carry Out the Judgment of the U. S. District Court, Southern District of Indiana to Restore or Cause to Be Restored Certain Rail Lines in Indiana. A copy of the Petition was attached to Mr. Richardson's affidavit as Exhibit G. Thereafter, the Trustees filed their Answer to Amtrak's Petition, a copy of which was attached to Mr. Richardson's affidavit as Exhibit H.

7. The contract between Penn Central and Amtrak consists of a Basic Agreement and an Arbitration Agreement. The Bankruptcy Court authorized the Trustees to execute the contract by Order No. 238, dated April 27, 1971. Pursuant to the contract, the Trustees ceased their rail passenger service, which was taken over by Amtrak on May 1, 1971, and Amtrak began using the Penn Central rail lines connecting Kankakee with Cincinnati and with Louisville on that day. For safety reasons, Amtrak trains were forced to cease operating over the Penn Central rail lines on August 1, 1974, and thereafter, Amtrak trains have had to use alternate routes belonging to other railroads, including the route of The Chesapeake and Ohio Railway Company.

8. On April 1, 1976, the major portion of the Penn Central rail lines connecting Kankakee with Cincinnati and Louisville were transferred to the Consolidated Rail Corporation ("ConRail") in accordance with a July 26, 1975, plan of the federal government. The transfer and plan were made pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701, *et seq.* Because of like transfers of most of its other railroad properties to ConRail, the Trustees are no longer operating over any of the rail line routes used by Amtrak passenger trains. ConRail has, therefore, since April 1, 1976, been providing the rail services required by Amtrak to operate over routes which had theretofore been routes of the Penn Central.

9. The complaint in this action was properly filed by Amtrak on May 5, 1976, under the provisions of the Federal

Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. The amount in controversy exceeds the sum or value of $10,000, exclusive of interest and costs. Subject matter jurisdiction is based upon diversity of citizenship under 28 U.S.C. § 1332 and on the presentation of a federal question under 28 U.S.C. § 1331 as to the effect of a judgment rendered in accordance with the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1-14. The Court has personal jurisdiction over the parties.

10. Venue is properly laid herein by virtue of 28 U.S.C. §§ 1391(a) and (b) since the cause of action upon which this complaint is based is the judgment of this Court entered on March 24, 1976, against the Trustees arising out of the application by this Court of the provisions of Sections 9 and 13 of the Federal Arbitration Act, 9 U.S.C. §§ 9 and 13.

11. Substantially all of the facts relating to the controversy which is the subject of this action arise in the Southern District of Indiana.

CONCLUSIONS OF LAW

1. The Court includes in its Conclusions of Law any statement of fact listed above which is a conclusion of law.

2. There is no genuine issue as to any material fact and Amtrak is entitled to judgment in its favor as a matter of law.

3. The Court had original jurisdiction to confirm or vacate the arbitration award of the National Arbitration Panel in the Penn Central case, in accordance with the provisions of Sections 9 and 10 of the Federal Arbitration Act and to enter judgment thereon in accordance with Section 13 of that Act.

4. The judgment so entered by this Court on March 24, 1976, has the same force and effect, in all respects, as a judgment in a civil action and the arbitration award so confirmed on the merits by judgment may therefore be enforced against the Trustees as if it had been rendered in such an action.

5. The judgment upon the arbitration award of the National Arbitration Panel entered by this Court on March

24, 1976, is *res judicata* concerning and is a conclusive bar against any further legal claims which may be made by the Trustees that:

(a) the award of the National Arbitration Panel and judgment of this Court entered thereon is invalid or nonenforceable because of the provisions of the Regional Rail Reorganization Act of 1973; or

(b) the rehabilitation of the rail lines which are the subject of this controversy at the sole cost of the Trustees is unreasonable or inequitable in view of the April 1, 1976, transfer of these lines to Con-Rail; or

(c) the judgment should not be carried out because of any facts, circumstances or legal defenses which could have been or ought to have been asserted during the confirmation proceedings as a ground for vacating the award under the provisions of Section 10 of the Federal Arbitration Act or for modifying or correcting this award under Section 11 of the Federal Arbitration Act, 9 U.S.C. §§ 10 and 11.

6. The law is with Amtrak and against the Trustees and judgment should be entered by separate entry in favor of Amtrak and against the Trustees on Amtrak's complaint in accordance with this Memorandum Order, Findings of Fact and Conclusions of Law.

Date: June 25, 1976.

WILLIAM E. STECKLER

Chief Judge, United States District Court for the Southern District of Indiana

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NATIONAL RAILROAD PASSENGER CORPORATION, *Petitioner,* vs. ROBERT W. BLANCHETTE, RICHARD C. BOND, JOHN H. McARTHUR, Trustees of the Property of PENN CENTRAL TRANSPORTATION COMPANY, *Respondents.*	CIVIL ACTION NO. IP76-76-C
NATIONAL RAILROAD PASSENGER CORPORATION, *Plaintiff,* vs. THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Defendant.* STATE OF INDIANA, OTIS R. BOWEN, GOVERNOR, THEDORE L. SENDAK, ATTORNEY GENERAL, PUBLIC SERVICE COMMISSION OF INDIANA, *Intervenors.*	CIVIL ACTION NO. IP74-420-C

ORDER OF CONFIRMATION CONCERNING NAP CASE NO. 11; IN RE: LEVEL OF RAIL UTILITY FINAL DECISION AND AWARD AS TO PENN CENTRAL

This matter is before the Court on the Petition to Confirm Arbitration Award of the National Railroad Passenger Corporation ("Amtrak"), concerning an arbitration award in favor of Amtrak and against the Trustees of the Property of the Penn Central Transportation Company ("Trustees"), made by the National Arbitration Panel ("Panel"), in NAP Case No. 11; In Re: Level of Rail Utility. By separate Order, this Court is also ruling today upon Amtrak's Petition to Confirm Arbitration Award concerning an arbitration award in favor of Amtrak and

against The Chesapeake and Ohio Railway Company ("C & O"), made by the Panel in NAP case No. 29; In Re: Chicago-Cincinnati Service. The two related confirmation actions by Amtrak, one against the Trustees and one against the C & O, were ordered consolidated by the Court on February 20, 1976.

Amtrak's Petition to Confirm the award against the Trustees was filed in this Court on February 4, 1976, under the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* The Panel's award was issued under the date of February 3, 1976, and a copy of that award was attached to Amtrak's Petition to Confirm as Exhibit I. A copy of the award is also attached to this Order of Confirmation. The Trustees do not oppose the confirmation by this Court of the award.

Having considered the Panel's award, Amtrak's Petition to Confirm, and the Trustee's response to Amtrak's Petition to Confirm, and being fully advised, it is

ORDERED, ADJUDGED AND DECREED

(1) that Amtrak's Petition to Confirm Arbitration Award, filed herein on February 4, 1976, be granted; and

(2) that the Final Decision and Award As to Penn Central of the National Arbitration Panel in NAP Case No. 11; In Re: Level of Rail Utility, dated February 3, 1976, be confirmed in accordance with 9 U.S.C. § 9 and judgment entered in accordance with 9 U.S.C. § 13.

Date: March 24, 1976.

WILLIAM E. STECKLER

Chief Judge, United States District Court for the Southern District of Indiana

NATIONAL ARBITRATION PANEL
271 Avenue of the Americas
Forty Second Floor
New York, N.Y. 10020

Leo D. Welch, Chairman — February 3, 1976

NAP CASE NO. 11; IN RE: LEVEL OF RAIL UTILITY FINAL DECISION AND AWARD AS TO PENN CENTRAL

This case was instituted before the Panel by a Notice of Arbitration, dated January 11, 1973, filed on behalf of National Railroad Passenger Corporation (Amtrak or NRPC) in accordance with Section 3 of the Arbitration Rules, for the purpose of settling a contract dispute between Amtrak and Illinois Central Gulf Railroad (ICG) and a contract dispute between Amtrak and the Trustees of the Penn Central Transportation Company, Debtor (Penn Central).

The contract involved in each dispute was a so-called "Basic Agreement", dated April 16, 1971, which Amtrak had entered into with each of the railroads that were to provide services to be performed by Amtrak, beginning May 1, 1971, under the Railroad Passenger Service Act of 1970 (the Amtrak Act). These railroads included ICG and Penn Central. The two disputes were consolidated into one proceeding before the Panel (NAP Case No. 11) because it would be necessary for the Panel to decide almost identical questions to resolve the disputes.

In the consolidated proceeding Amtrak requested the Panel to find that ICG and Penn Central had not maintained certain of their lines used by Amtrak trains in accordance with the obligation undertaken by them in Section 4.2 of the Basic Agreement, which states:

> "The Rail Lines of Railroad used in NRPC's Inter-City Rail Passenger Service pursuant to either Article Three or Article Four hereof shall be maintained by Railroad at not less than the level of utility existing on the date of the beginning of such use."

Amtrak also requested the Panel to grant specific performance awards that would require ICG and Penn Central, at their sole cost, to restore their respective rail lines in-

volved in this proceeding to the level of utility required by Section 4.2.

The rail lines of ICG in controversy were those used between Chicago and New Orleans by Amtrak's northbound and southbound trains, both known as "The Panama Limited."

The rail lines of Penn Central in controversy involve two routes over which Amtrak trains began operations on May 1, 1971, and over which Amtrak trains were operating when this arbitration proceeding was instituted. One route connected Chicago and Washington via Indianapolis and Cincinnati and was used by Amtrak's eastbound train, "The George Washington", and by Amtrak's westbound train, "The James Whitcomb Riley". A section of these trains operates to Newport News, Va. From May 1, 1971, until October 16, 1973, these trains operated on the ICG rail lines from Chicago to Kankakee, Illinois, which lines were also used by The Panama Limited, and on Penn Central lines between Kankakee and Cincinnati via Lafayette and Indianapolis.

The other routes connected Chicago and St. Petersburg via Indianapolis and Louisville, and was used by Amtrak's northbound and southbound trains, both known as "The Floridian". A section of these trains operates to Miami. From May 1, 1971 until January 24, 1972, these trains operated over the ICG lines from Chicago to Kankakee, which lines were also used by The Panama Limited, and then over Penn Central lines from Kankakee to Louisville via Lafayette and Indianapolis.

As hereinafter pointed out, Amtrak trains do not now operate over any of the Penn Central lines that were used by the above trains on May 1, 1971 and at the time of the institution of this arbitration proceeding, since such lines have deteriorated to a point where they cannot be used for passenger service.

Following extensive hearings conducted on the factual matters and other issues in dispute between Amtrak and ICG, the Panel on November 20, 1973, handed down a Decision and Award interpreting and setting forth the meaning of the obligation that ICG had assumed under Section 4.2, found that the evidence indicated a failure by ICG to maintain the rail lines in controversy at the level of utility required by Section 4.2, and directed that steps be taken by the parties looking toward a detailed plan for bringing the utility of the ICG lines in controversy up to the standards required by the Basic Agreement and envisioned by the Amtrack Act, as such standards were interpreted by the Panel. The Panel handed down a Final Award as to ICG on December 31, 1974, granting specific performance and incorporating such a plan.

The initial hearings in Case No. 11 involved Penn Central as well as ICG. Following these initial hearings, the Panel, on November 29, 1973, requested Penn Central and Amtrak to furnish it detailed, up-to-date information with respect to the facts involving the Penn Central portion of the case. This information was submitted to the Panel in September of 1974. Shortly prior thereto, on August 30, 1974, at the request of Amtrak and with the concurrence of Penn Central, the Panel had placed the Penn Central portion of the case on "inactive" status. After allowing the case to lie dormant for a year, Amtrak requested, in a letter dated August 15, 1975, that the case be reopened.

Beginning on September 11, 1975, additional hearings were conducted by the Panel on the Penn Central portion of the case, which hearings were concluded on January 20, 1976. This Final Decision and Award is directed to the obligation of Penn Central under Section 4.2 of the Basic Agreement, and to a delineation of the work which the Panel has found to be necessary to effect specific performance of such obligation.

In line with the interpretation of Section 4.2 in the Panel's Decision and Award of November 20, 1973 as to ICG, the majority of the Panel finds, as to Penn Central, that:

1. the Rail Passenger Service Act of 1970 and its subsequent amendments demonstrate a strong Congressional intent that the rail passenger service to be provided by NRPC (Amtrak) should be fast, convenient and efficient. The parties to the NRPC Agreement of April 16, 1971 (the Basic Agreement) recognized this Congressional intent and incorporated it into their contract by Sections 3.3 and 4.4 thereof, and
2. pursuant to the goals outlined in Section 3.3 of the Basic Agreement, Penn Central agreed in

Section 4.2 to maintain its rail lines used in Amtrak's intercity passenger service "at not less than the level of utility existing on the date of the beginning of such use," and

3. the level of utility to Amtrak of the rail lines of Penn Central involved in this case on May 1, 1971, the date of first use, is reflected and embodied in the schedules agreed upon by Penn Central for Amtrak trains that were to use such lines, and accordingly Penn Central assumed the obligation by Section 4.2 of the Basic Agreement to maintain, at its sole cost, its rail lines involved in this proceeding in such a way as to allow the accomplishment of the agreed-upon schedules with a reasonable degree of regularity and with a reasonable degree of passenger comfort.

The majority of the Panel finds further that the evidence in this case clearly shows a failure by Penn Central to maintain its rail lines involved in this proceeding at the level of utility agreed upon, within the meaning of such term as described above and in the Panel's Decision and Award of November 20, 1973. In fact, the evidence shows that the Penn Central rail lines involved in this case have deteriorated to such an extent that, for safety reasons, they cannot now be used for passenger service. Because of the deteriorated condition of the Penn Central lines, Amtrak has been required to use alternate lines over other railroads, which lines formerly carried only freight traffic, in order to reach the endpoints it is required to serve. Use of these alternate lines makes it impossible for Amtrak to serve a number of important cities in Indiana, where virtually all of the rail lines in this case are situated, including the capital city of Indianapolis. Amtrak has obtained access to these alternate routes over other railroads by claiming the right to do so under the terms of the Basic Agreement. C&O, one of the railroads owning the alternate lines, has contested this right in a companion case to Case No. 11, namely Case No. 29. In a Decision and Award of November 7, 1974, the Panel held in Case No. 29 that Amtrak was entitled to the services requested by Amtrak under the terms of the Basic Agreement. Following this Decision and

Award, Amtrak bought confirmation of the award in the United States District Court for the Southern District of Indiana, Indianapolis Division. This Court had previously, on petition of Amtrak, enjoined C&O from refusing to perform the requested services, pending arbitration by this Panel. The confirmation proceedings are still pending before such Court. In a letter from its President, Mr. Reistrup, Amtrak has informed the Chairman of the Panel that Amtrak intends to return its trains to the Penn Central lines in controversy as soon as they are placed in a condition to accept such service. Similar assurances have been given by Amtrak to the Court in the Case No. 29 confirmation proceedings.

The majority of the Panel also finds that Amtrak is entitled to have Penn Central specifically perform whatever acts or obligations as may be necessary to restore the rail lines in controversy, namely those connecting Kankakee with Cincinnati via Indianapolis, and connecting Kankakee with Louisville via Indianapolis, to the level of utility required by Section 4.2 of the Basic Agreement as such Section has been interpreted herein and in the above mentioned Decision and Award of November 20, 1973. The Panel, therefore, directs Penn Central, without cost to Amtrak, to do or cause to be done the work delineated below and found by the Panel to be necessary to restore such rail lines to their May 1, 1971 level of utility, as such level of utility has been defined by the Panel.

THE PANEL PROGRAM

Pursuant to authorization by the Panel, on October 24, 1975 Amtrak submitted an engineering study, prepared on its behalf by the engineering firm of Sverdrup & Parcel, for restoration of the Penn Central lines in controversy to the level of utility described herein. Thereafter, on December 5, 1975, Penn Central submitted comments on this engineering study. On December 16, 1975, the Panel conducted hearings concerning the differences between the parties as to the extent of the work that would be required, and both parties presented extensive oral testimony and exhibits in support of their respective positions. At the close of these hearings, and at the direction of the Panel, both parties

agreed to meet in an attempt to resolve their differences. Such meetings took place and as a result agreement was reached as to the standards to be used in determining the level of utility of the lines that would comply with the interpretation of Section 4.2. in the Decision and Award of November 20, 1973. Agreement was also reached as to many of the differences relating to the amount and type of work that would have to be done to bring the lines up to the agreed upon standards. The only important matter not resolved was with respect to the amount and type of work that would be needed in connection with the relaying of approximately forty-five miles of rail.

After an exhaustive study and analysis of all facts and arguments presented by the parties, the Panel adopts as the program to be followed in carrying out the award in this case the "Panel Program" attached hereto, which Panel Program is made a part of this Final Decision and Award. The Panel Program is based on two portions of a revision by Sverdrup & Parcel of its engineering study, made in January, 1976, following the meetings of the parties referred to above. The portion of the Panel Program under the heading "Standards" incorporates the standards agreed upon by the parties, and are essentially the same standards, except as to rail, prepared by the consultants for Amtrak and ICG and included in the plan adopted by the Panel in its Final Decision and Award of December 31, 1974 as to ICG for the restoration of its lines involved in this case. The portion of the Panel Program under the heading "Necessary Rehabilitation" incorporates the agreement of the parties as to the amount and type of work needed, to the extent that there was agreement, and otherwise reflects the determination of disputed matters by the Panel.

Sverdrup & Parcel submitted to the Panel detailed cost estimates of the work that would have to be performed under the Panel Program, computed for the most part on the basis of unit costs for labor, equipment and commodity developed by the Bechtel Corporation for use by USRA in determining the approximate cost of rehabilitating Penn Central lines to be acquired by the Consolidated Rail Corporation (ConRail) pursuant to the Regional Rail Reorganization Act of 1973. Such cost estimates were made on the assumption that the work would be done by a third party hired to do the work. Sverdrup & Parcel estimates that the cost, less salvage, would be approximately $22,690,000., based on October 1975 costs, and without allowing for profit. Penn Central estimates that the cost, less salvage, would be approximately $11,500,000. Its figures were also based on October 1975 costs, but assumed that the required work would be performed by Penn Central employees.

In view of the uncertainty as to who will actually perform the work, any determination by the Panel as to the cost of rehabilitating the lines to the required level of utility would be based on unwarranted speculation. The Panel therefore orders only that specific performance be performed. No finding is made as to cost.

The Panel orders that Penn Central specifically perform its obligation under Section 4.2. to maintain its rail lines involved in this case and that it do so in accordance with the following:

1. Penn Central shall institute, or cause to be instituted, a program for the relaying of rail, for tie replacement, for ballasting, for surfacing and for alignment which would complete all of the work shown in the attached Panel Program, at no cost to Amtrak, by January 1, 1978, Notwithstanding any provisions of this Final Decision and Award or the Panel Program, if it is found in performing the required work that the rail, ties, ballast, surface or the alignment on any part of the rail lines in question between any two adjacent mile posts is in strict accordance with the Standards set forth in the Panel Program, no work need be accomplished on such part or parts.

2. In the sections of track described by mile post in the Panel Program to be restored, Penn Central shall replace, or cause to be replaced, at no cost to Amtrak, sufficient defective ties so that not less than 16 non-defective ties remain in each 39-foot track length and so that there will be no violations of Federal Railroad Administration minimum requirements with respect to cross-ties.

3. Penn Central shall institute, or cause to be instituted, at no cost to Amtrak, a program for the repair or replace-

ment, by January 1, 1978, of all turnouts, highway crossings and railroad crossings indicated in the Panel Program as being defective.

4. Penn Central shall institute, or cause to be instituted, at no cost to Amtrak, a vegetation control program which will ensure that by the end of the 1977 work season the vegetation on all the track along the rail lines in controversy has been adequately controlled within ten feet of the track centerline.

5. All the work as specified above to be done, and all other work specified to be done in the Panel Program, shall be in strict accordance with the applicable Standards specified in the Panel Program and shall be completed by January 1, 1978. Within ninety days of the date of this Final Decision and Award, the Penn Central shall submit to Amtrak a detailed work schedule, by quarters, that would meet the completion date of January 1, 1978, and work shall start promptly thereafter. Once the work has been started in compliance with this Final Decision and Award, quarterly reports shall be made to Amtrak showing work accomplished. Reports to Amtrak shall include sufficient information concerning the status of planning for work not yet in progress so that Amtrak will be in a position to know at all times whether or not the level of utility of the rail lines in controversy will be restored by January 1, 1978, as required by this Final Decision and Award.

6. In the event Penn Central, while using its best efforts to comply with this Final Decision and Award, determines that unforeseen and unusual circumstances will require a major revision in the restoration completion date as set forth above, the Penn Central shall inform Amtrak immediately of such determination and its reasons why a revision seems necessary. However, in no event except force majeure (as defined in the Basic Agreement) shall less than 100% of the work specified in the Panel Program be accomplished by January 1, 1978 unless Amtrak first agrees to an extension thereof.

Article Six of the Basic Agreement limits the authority of the Panel to "the interpretation, application, or implementation of this Agreement," and Section 4.5 of the Arbitration Agreement requires that the Panel "be governed

by the provisions and language of the applicable Basic Agreement or Agreements." Accordingly, the Panel does not consider that it is the proper body to decide whether, or to what extent, the Regional Rail Reorganization Act of 1973 or the Final System Plan thereunder may affect the carrying out of this award.

LEO D. WELCH
Chairman

JAMES A. FARMER

DISSENTING OPINION

The majority of the Panel, hereinafter referred to as the majority, has reaffirmed its construction of Section 4.2 adopted in NAP 11 (ICG), namely, that the undertaking to maintain lines "at not less than the level of utility existing on the date of beginning" of use by Amtrak means that they "must be maintained in such a way so as to allow the accomplishment of the agreed upon schedules with a reasonable degree of regularity and passenger comfort." Since the schedules in effect on May 1, 1971, have not been accomplished since September 1971, the majority finds that Penn Central has been and is in default of its Section 4.2 obligation.

I dissented in NAP 11 (ICG) and, rather than repeat the detail of that dissent, it is incorporated herein by reference. In essence, it took the position that Section 4.2 was intended to prevent a railroad from downgrading its track by reducing maintenance below the May 1, 1971, level after that date and excluded any obligation to upgrade its lines by increasing maintenance above the May 1, 1971, level. Indeed Section 4.3 imposed on Amtrak sole responsibility for added expense of any upgrading of lines, requested by it, above the May 1, 1971, level of utility.

In my opinion, the rather unusual situation presented in this case illustrates the basic invalidity of the majority's construction of Section 4.2. Implementation of its standard of schedule accomplishment by adoption of the Amtrak rehabilitation program would produce a most arbitrary and inequitable result. The evidence of both parties establishes

that lines under consideration were in poor condition on May 1, 1971, reflecting years of deferred maintenance. Derailment of an Amtrak train in September 1971 indicated they had not been in such condition as to safely permit operation at speeds necessary to meet the May 1, 1971, schedules and, consequently, slow orders were issued limiting speeds to thirty miles an hour on most of the lines and ten miles an hour on the balance. The schedules have not been met since September 1971. Thus, under the majority's construction of Section 4.2, Penn Central would have been obligated in September 1971 to upgrade the lines above their May 1, 1971, level at its expense in order to meet the schedules even though Section 4.3 imposes the burden of such an improvement on Amtrak. In any event, the rehabilitation program adopted by the majority, while enabling the schedules to be accomplished, would place the lines in far better condition than they were on May 1, 1971, and the full financial burden of this would be imposed on the bankrupt Penn Central estate.

Having expressed my disagreement with the rationale of the majority's finding of default, I must concur in the ultimate conclusion that there has been a breach of the Section 4.2 obligation of Penn Central. The record does show that the physical condition of the lines, at least in substantial part, has generally deteriorated since May 1, 1971, and they are in even worse condition now than they were then.

The Panel cannot make a determination on the record before it as to what extent the expense of the rehabilitation program represents upgrading, on the one hand, and restoration, on the other. However, a substantial upgrading of the lines above their May 1, 1971, condition is clearly contemplated by the program. In these circumstances, if a specific performance award could lawfully be entered, which for reasons that follow I do not believe is possible, it should provide that the expense of the program be shared equally by Amtrak and Penn Central. Such an approach would serve to reconcile application of Sections 4.2 and 4.3 and would constitute an equitable allocation of the burden, assuming that Penn Central could do the work itself and retained ownership of the lines.

Nevertheless, the majority has entered a specific performance award requiring Penn Central "to institute or cause to be instituted" a major rehabilitation program at its sole expense. According to Amtrak's estimate, which is predicated on employment of a third party contractor to do the work, this program involves a net expenditure of over $22 million, based on October 1975 level of wages and prices of materials, and without any profit allowance to such third party contractor. While Penn Central estimates that the work could be performed for $11.5 million by it, using Penn Central personnel, the record leaves no doubt that performance by Penn Central will be impossible because of impending and foreseeable developments beyond its control.

The potential impact of its decision on the bankrupt estate is not confined, it should be noted, to this proceeding because Amtrak has advised the Panel that it will seek a further award or awards requiring rehabilitation of all other Penn Central lines used by Amtrak outside of the Northeast Corridor. The financial scope of the over-all objective is apparent. For example, the rail lines from New York to Chicago and New York to St. Louis, over which the Broadway Limited and the National Limited, respectively, operate have a combined route mileage of 1995 miles compared with the 338 route miles in question in this case. If rehabilitation costs for the latter are any guide, it is evident that rehabilitation costs for all lines could exceed $100 million.

In view of the foregoing, it is somewhat surprising that the majority opinion sees fit to avoid any discussion or consideration of an intervening development since the Agreement of April 16, 1971, was executed which raises serious questions as to the Panel's legal authority to issue the specific performance award sought by Amtrak, namely, the Regional Rail Reorganization Act of 1973 (Reorganization Act). Although forcefully presented by counsel for Penn Central, the majority disposes of the issues involved on the unsupported ground that determination of these questions is beyond its province.*

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* The majority appears to have adopted the contention of Amtrak counsel: "On the other hand, if the Penn Central is lawfully entitled to relief from their contract obligations freely undertaken on April 16, 1971, then

Since these questions go to the existence of the obligation for which enforcement is sought and the possibility or impossibility of compliance with the specific performance award in accordance with the provisions of the contract, I do not believe that the Panel discharges its responsibilities by simply, in effect, referring them to judicial determination. Section 4.2 of the National Railroad Passenger Corporation Arbitration Agreement provides that any arbitration award "shall declare the rights of the parties" and may "require specific performance by a party of any act or *obligation.*"

Although the issues raised by these questions are left to court determination *de novo*, the effect of the Reorganization Act on Penn Central's Agreement with Amtrak, which was called to the Panel's attention, should be described in this dissent.

On April 1, 1976, Penn Central will cease to be a railroad carrier, except as to possible minor exceptions not material here, as a result of the Final System Plan (F.S.P.) adopted by the United States Railroad Administration created by the Reorganization Act. Most of its rail lines will have been conveyed on that date to Consolidated Railroad Corporation (Conrail), also created by the Act, or to profitable rail lines, pursuant to mandatory orders of the Special Court established by the Act,* and discontinuance of service on the balance of its rail lines concurrent with such conveyances is authorized by the Act.** *Significantly, all*

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it can surely find adequate relief in the courts from any award this Panel might grant. Thus, if the Panel has no power to issue the specific performance herein requested, an adequate remedy is available to the Penn Central to protect itself from injury. The Award can be appropriately attacked under the provisions of the Federal Arbitration Act for vacating an improper award. (Amtrak letter Dec. 23, 1975, to Panel Chairman)

* The Supreme Court held in *Regional Rail Reorganization Cases*, 419 U.S. 102, 141: ". . . The Special Court is mandated to order the conveyance of rail properties included in the Final System Plan and is granted no discretion not to order the transfer. . . . The Rail Act empowers no court, including this court, to prevent it."

** *Reorganization Cases* held ". . . railroads in reorganization subject to the Act are free to abandon service and dispose as they wish of any rail properties not designated for transfer under the Final System Plan . . ." (419 U.S. 102, 116). On Dec. 9, 1975, Penn Central posted notice of discontinuance of service of 5000 miles of rail lines not designated for transfer.

of the lines involved in this case will be conveyed to Conrail. The conveyances designated in the F.S.P. are not limited to rail lines. All Penn Central roadway machinery, like work equipment, and all maintenance of way materials and supplies are designated for conveyance by April 1, 1976 (F.S.P. Vol. II, pp. 250 and 251). Broad conveyance designations as to such items as "Administrative Assets: Offices, Warehouses, Supplies, Records," etc., are also included. On top of all this, Penn Central personnel—operating, maintenance of way, engineering and others—will become employees of Conrail or other acquiring railroads on April 1, 1976, or be eligible for severance benefits. In short, Penn Central will be virtually out of the railroad business lock, stock and barrel on April 1, 1976.

All of these facts were called to the Panel's attention. Yet they make it perfectly clear that Penn Central cannot possibly comply with that part of the majority's award that requires Penn Central to prepare within ninety days (approximately May 1, 1976) a detailed plan for completing the work by January 1, 1978, and thereafter to "institute" requisite improvements for completion within the specified period. In the language of the vernacular, there is "no way" this can be done.

The majority, implicitly recognizing this unavoidable fact, prescribes in the alternative that Penn Central shall "cause to be instituted" the requisite program. This assumes, of course, that Section 4.2 imposes on Penn Central an obligation to improve lines owned by another railroad and to utilize a third party contractor for this purpose. Before discussing the erroneous character of this assumption, it should be noted parenthetically that the only third party contractor which could possibly perform the work is Conrail. This was conceded by Amtrak. Under existing Penn Central labor union contracts all maintenance work must be done by its employees and Section 506 of the Reorganization Act provides that the same limitation shall apply when these employees are transferred to Conrail.

The underlying reasoning for holding that Penn Central should be required to try to contract with Conrail for improvement of Conrail lines at Penn Central's expense for Amtrak's benefit is not explained in the majority opinion, but it necessarily assumes that the Reorganization Act will not terminate Penn Central's obligation under the Agreement on and after April 1, 1976. This is patently wrong in my view.

Penn Central's service and maintenance obligations incidental thereto are confined by the express terms of the Agreement to *its "Rail Lines"* and obviously contemplate performance by Penn Central employees, in view of long-standing labor union agreements, thus excluding use of third party contractors.* The Reorganization Act provides that conveyances to Conrail shall include "all right, title and interest (of Penn Central) in the rail properties." (Reorganization Act, Section 303(b)). Thus, Penn Central's service and maintenance obligations as to the lines under consideration will of necessity terminate upon their conveyance to Conrail. They will no longer be its "Rail Lines;" they will be Conrail's. Indeed, the Reorganization Act is designed to free Penn Central of its railroad carrier obligations on April 1, 1976.

As a matter of fact, the Reorganization Act specifically recognizes that "the value of obtaining freedom from current contractual liabilities" is one of the benefits contemplated for bankrupt roads. Section 303(c)(1)(A)(i) provides that the Special Court in passing on the fairness of compensation for mandated conveyances by a railroad in reorganization to the Corporation to consider not merely the value of the securities received by the railroad for the exchange, but also "the other benefits accruing to it as a result of the exchange." (F.S.P. Vol. I, p. 128) The Final System Plan states:

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* Article 111, Sec. 3.1 obligates Penn Central "to provide NRPC (Amtrak), over *Rail Lines of Railroad,* with the services requested by NRPC;" Article IV, Sec. 4.2 confines its maintenance obligations to *"The Rail Lines of Railroad* used in NRPC service;" and Article IV, Sec. 4.1 provides that *"The Rail Lines of Railroad* shall include all *its* rights of way and real properties appurtenant thereto which constitute *its* trackage, whether owned or leased or otherwise held by it."

> "Other benefits are provided to the estates by the Act either in the form of an increase in realizable values on retained assets or *through the elimination of obligations or liabilities associated with the assets conveyed.*" (F.S.P. Vol. I, p. 129)

It is difficult to conceive of an obligation or liability more closely associated with properties conveyed than the maintenance obligation with respect to the rail lines in question assumed by Penn Central under Section 4.2 of the April 16, 1971, Agreement.

The majority's award requires performance of work which cannot be instituted prior to April 1, 1976, when the obligation it seeks to enforce will have been terminated as a result of governmental action and intervention. The Panel, in my judgment, has the responsibility of determining whether a specific performance order is or will be related to an existent obligation, but, as previously indicated, the majority opinion does not consider this question, which goes to the essence of its authority to act.

Furthermore, the majority opinion does not consider whether the performance it has ordered is in accordance with the terms and intent of the Agreement. Penn Central did not obligate itself to improve lines acquired from it and owned by another, Conrail in this case, or to do so under a contract with a third party. Penn Central's obligation was limited to maintaining its own lines with its own equipment, materials and personnel. Amtrak's request for specific performance conflicts with the legal principle:

> "If it is impossible to perform a contract according to its terms, a party cannot insist on another type of performance to obtain the same result that would have obtained if the contract had been performed instead of being discharged." (17 A C.J.S. p. 605)

It also conflicts with the following statement in Corbin on Contracts (1962 Ed.):

> ". . . if one contracts to render a specified performance that requires the existence of a definite physical condition or means of performance, he will usually be discharged from duty by the destruction

or non-existence of these necessary means or conditions." (Vol. 6, pp. 394-395)

This is a clear cut case in which supervening impossibility of performance has been created by governmental action under the Reorganization Act.

The physical condition and the means of performance contemplated by the Agreement will be non-existent on and after April 1, 1976, as a result of this governmental intervention. Penn Central will no longer have the rail lines to improve or equipment, materials and supplies, and personnel essential to its carrying out a rehabilitation program. The doctrine of supervening impossibility of performance finds full application to this situation.*

Aside from the foregoing considerations which go to the Panel's authority to issue the majority's award and its lawfulness, there are several other aspects of the case that merit comment.

In the first place, the Final System Plan contemplates that Penn Central will be required to convey properties to Conrail in exchange for securities which reflect the value of such properties based on their net liquidation value. The United States Railroad Administration made a comprehensive assessment of the physical conditions of Penn Central rail lines to be conveyed to Conrail, utilizing Bechtel Corporation and others for this purpose, and made a determination of their value for exchange purposes on the basis of salvage value of the properties in their 1974 condition. The total valuation of all Penn Central properties to be transferred to Conrail was only 495 million dollars. Securities to be issued to Penn Central are to be based under the Plan on this valuation after giving consideration to other benefits accruing to Penn Central as a result of the Act, such as

* 17A C.J.S. 22; Corbin on Contracts (2d Ed.) Vol. 5A, p. 253, Vol. 6, pp. 324-325, 394-395. Corbin states the concept of supervening impossibility of performance rests on an implied condition in the contract that obligations can be met. Reliance on an implied condition is not necessary in this case because Section 8.1 of the Amtrak Agreement expressly makes compliance subject to force majeure which is defined to include "circumstances beyond the control of the parties claiming such force majeure for non-performance."

freedom from contractual obligations "associated with the assets conveyed." (F.S.P. Vol. I, p. 129) It seems manifestly inequitable to impose on the bankrupt Penn Central estate under these circumstances the burden of giving Conrail millions of dollars for improvement of Conrail lines. Yet, as indicated before herein, this would be the necessary effect of the majority's award, assuming Conrail's willingness to enter into a contract with Penn Central for compliance with the award.

In the second place, the record reveals that Amtrak has already persuaded the United States Railroad Administration that Conrail should assume the expense of rehabilitating the lines in question in this case, as well as other Penn Central lines used in Amtrak service which are to be acquired by Conrail, and that the standard of rehabilitation shall be to permit accomplishment of the May 1, 1971, schedules (F.S.P., Vol. I, pp. 30, 43-44). As a result of studies conducted by Bechtel Corporation, referred to before herein, Conrail will have information as to the physical conditions of the lines and what will be required for their rehabilitation to meet the May 1, 1971, schedule accomplishment standard. Furthermore, S. 2718 contains an authorization for over two billion dollars to Conrail for rehabilitation of rail properties to be acquired by it and other purposes. It seems incongruous in these circumstances for Amtrak to attempt to impose the burden on the bankrupt Penn Central estate of rehabilitating all lines acquired from Penn Central outside the Northeast Corridor which are to be used in Amtrak service. Congress has already given its sanction to the Final System Plan, including assumption by Conrail of responsibility for rehabilitation of Amtrak service lines, and is authorizing appropriations to discharge this responsibility.

For reasons stated herein, I dissent from the majority's conclusion that the Panel should not concern itself with questions as to the legal effect of the Reorganization Act on Penn Central's obligations under the Amtrak Agreement as well as its ability to comply with the performance award sought by Amtrak. In my opinion, such a conclusion places the Panel in a position of dereliction in the discharge of its arbitration duties. Accordingly, I would deny

issuance of a specific performance award on the grounds set forth in this dissent.

STANFIELD JOHNSON

February 3, 1976

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY, *Debtor*	In Proceedings for the Reorganization of a Railroad BKY. No. 70-347

Re: Petition of the National Rail Passenger Corporation

ORDER NO. 2569

AND NOW, this 30th day of September, 1976, upon consideration of the "Petition of National Rail Passenger Corporation for Order Authorizing, Instructing and Directing the Trustees to Carry out the Judgment of the U. S. District Court, Southern District of Indiana to Restore or Cause to be Restored Certain Rail Lines in Indiana" (Document No. 10440), and after hearing thereon, it is ORDERED:

1. The petition is DENIED.

2. The Petitioner, National Rail Passenger Corporation ("Amtrak"), is enjoined from instituting or furthering any legal proceeding for the assertion or enforcement against the Trustees or the estate of the Debtor of any alleged obligation or liability for track maintenance or improvement, in any jurisdiction or before any tribunal except this Court (or, if appropriate, in the Special Court), or as otherwise ordered by this Court. Nothing in this Order shall be deemed to apply to the appeal now pending in the Circuit Court of Appeals of the Seventh Circuit, nor to any appeal from this or any other Order of this Court.

JOHN P. FULLAM, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY, *Debtor*	In Proceedings for the Reorganization of a Railroad BKY. No. 70-347

Re: Petition of National Rail Passenger Corporation to Enforce Arbitration Award

MEMORANDUM AND ORDER NO. 2569

FULLAM, J. October 1, 1976

National Rail Passenger Corporation ("Amtrak") has petitioned this Court for an order directing the Trustees of the Debtor's estate to carry out the terms of an arbitrators' award (National Arbitration Panel Case No. 11—In re: Level of Utility) which was confirmed by a judgment entered in the United States District Court for the Southern District of Indiana on March 24, 1976 (Civil Actions Nos. IP 76-76-C and 74-42-C). The award determined that the Trustees had failed to maintain certain passenger trackage, principally located in Indiana, in such condition as to provide for the same level of passenger service which was in effect as of May 1, 1971, as required by ¶ 4.2 of the "basic agreement" between Amtrak and the Trustees, which became effective as of May 1, 1971, in accordance with Order No. 238 in these proceedings. In essence, Amtrak seeks to have the Trustees perform the required engineering work for a program of upgrading the trackage in question, and either to perform or arrange with others to perform the necessary work, all at the expense of the Debtor's estate. (In the course of the arbitration proceeding, estimates of the costs involved ranged from $11.5 million to $22 million.)

Although Amtrak has petitioned this Court to enforce the arbitrators' award, as confirmed by the Indiana court, it is apparently the contention of Amtrak's counsel that the only issues which this Court has the jurisdiction to decide relate to choices as to which of the Debtor's assets should be devoted to the contemplated track improvement. Amtrak seems to be contending that all other issues either

have already been decided elsewhere, or cannot be decided because they should have been decided elsewhere. In order to attempt to understand these contentions, it is necessary to review briefly the checkered procedural history of this case.

The basic agreement between Amtrak and the Trustees requires the Trustees to maintain facilities at the same service levels prevailing as of May 1, 1971. It also provides for compensation to the Trustees by Amtrak in amounts related, initially, to costs incurred solely for passenger service. The contract also provides for arbitration of disputes. However, in authorizing the Trustees to enter into the agreement, this Court's Order No. 238 imposed the condition that final determinations of arbitrators would be subject to review and approval by this Court before becoming finally binding upon the Trustees and the Debtor's estate. In compliance with that condition, several such awards have been submitted to this Court for approval or rejection.

The arbitration proceeding pertaining to the level of maintenance of the Indiana trackage was instituted by Amtrak, in 1972, but the hearings were postponed for a lengthy period at Amtrak's request.[1] After hearing, the arbitrators (by a 2 to 1 vote) reached their decision on February 3, 1976. Amtrak later petitioned the United States District Court for the Southern District of Indiana to confirm the award. The Trustees then petitioned this Court to enjoin Amtrak from proceeding with the Indiana litigation, invoking the condition set forth in Order No. 238 and the general powers of the Bankruptcy Court. At the hearing in this Court, counsel for Amtrak acknowledged that the award could not be enforced against the Trustees or the debtor's estate except as this Court might direct; made clear that it would be his contention that Amtrak was not bound by the condition set forth in Order No. 238; but contended that this was academic, since the Indiana Court was being asked to do nothing more than confirm the award of the arbi-

[1] At a recent conference in chambers in this matter, Amtrak's counsel stated that it was his understanding that the delay was occasioned in part by uncertainty as to the desirability of pressing the issue, and in part by the need for time to gather evidence.

trators. It was conceded that, quite apart from the question of Order No. 238 and the condition it imposed, Amtrak would have to return to this Court in order to obtain enforcement of the arbitrators' decision.[2]

On that basis, I dismissed the Trustees' Petition and permitted the Indiana confirmation proceeding to go forward. Thereafter, the Trustees appeared in the Indiana court and stipulated that they had no objection to the entry of a judgment confirming the arbitrators' award, so long as the judgment was strictly limited to the actual award of the arbitrators. The Trustees submitted a proposed form of the judgment which they would be satisfied to have entered, and that was the order which was entered.

Amtrak then filed the present petition. The Trustees filed an answer, reiterating the position which they had taken, and which had been fully discussed, at the earlier hearings in this Court, namely, that as of April 1, 1976, substantially all of the Debtor's rail properties had been conveyed to ConRail, ConRail had taken over all rail operations, and substantially all of the Debtor's personnel were now employed by Amtrak. In essence, the Trustees pointed out that implementation of the Rail Act relieved them of all further operating responsibilities, including any vestigial responsibilities emanating from the basic agreement with Amtrak, and that compliance with the arbitrators' award is now a legal and practical impossibility.

Amtrak thereupon sought, and obtained, a postponement of the hearing on its petition (asserting that the scheduled date would be personally inconvenient to its counsel) and returned to the Indiana court to file a "Petition for Declaratory Judgment" seeking, *inter alia,* a determination by the Indiana court that its earlier judgment confirming the arbitrators' award was *res judicata* as to, and barred all further assertion of, issues relating to the possible impact of the Rail Act upon enforcement of the arbitrators' award. Concurrently, Amtrak sought a stay of all proceedings in

[2] In retrospect, this statement of Amtrak's position may represent only one of several alternative positions. Counsel's argument was prolix and not notably lucid. But it is the only contention which this Court found acceptable as a basis for non-interference in the confirmation litigation.

this Court on its own petition for enforcement, and when this proved unsuccessful, sought further stays from the Court of Appeals and even from the United States Supreme Court. Application to the Supreme Court was filed on the eve of the scheduled hearing; a temporary stay was granted pending receipt of the Trustees' response to the application. The stay was dissolved a few days later, and the hearing in this Court was rescheduled.

In the Indiana declaratory judgment proceeding, Amtrak's counsel drafted and submitted to that Court a statement of findings and conclusions, and a form of order, all of which were signed by the court on June 25, 1976. In essence, as I understand it, this Order declares that the Trustees are barred, by the earlier judgment confirming the arbitrators' award, from asserting in this Court or elsewhere any issues relating to the impact of the Rail Act upon enforcement of the award, and all issues relating to alleged impossibility of performance. An appeal has been taken from this Order, which is now pending in the Seventh Circuit.

II.

The first issue to be addressed is whether, as Amtrak contends, this Court lacks jurisdiction to consider whether the interposition of the Rail Act relieves the Trustees of further responsibility with respect to the upgrading of trackage now owned by ConRail. Amtrak's argument involves two somewhat related assertions: (1) that the reservation in Order No. 238 does not confer jurisdiction to review the arbitrator's award, because that reservation was invalid, and in any event is not binding upon Amtrak in any way; and (2) the doctrine of *res judicata* precludes consideration of the stated issue by this Court, in view of the judgment or judgments entered in Indiana.

A. Validity and Effect of Order No. 238.

The provision in the basic agreement relating to arbitration of disputes such as that involved in Case No. 11 is purely contractual; it was not mandated by the Rail Passenger Service Act of 1970. The Trustees' Petition to this Court seeking authorization to enter into the basic agree-

ment with Amtrak was not unopposed, and many legitimate and substantial objections to the proposed contract were asserted by various parties. The statute provided for resolution by the Interstate Commerce Commission of certain disputes relating to the basis of compensation to the Trustees for operating the passenger service. Obviously, parties dissatisfied with the ICC decisions in this area would be able to obtain judicial review of those determinations. It was felt that many of the other issues which, under the contract, would be submitted to arbitration before the National Arbitration Panel, might prove to have equally substantial impact upon the Debtor's estate, yet, under the contract as originally proposed, would escape meaningful judicial review in any forum. As discussed in the Opinion filed in connection with the entry of Order No. 238, serious questions were raised as to the possibly unconstitutional impact of the basic agreement. At the very least, therefore, it seemed desirable to insure that the arbitration provisions were not so utterly open-ended as to give rise to an argument that unconstitutional impact could not be prevented.

Moreover, there was at least a serious question as to the legal propriety in a railroad reorganization context of authorizing a contract with binding arbitration provisions of the type contemplated. Section 26 of the Bankruptcy Act did provide for arbitration; however, § 26(c) provided:

> "c. The written finding of the arbitrators or of a majority of them as to the issues presented may be filed in court and shall have like force and effect as the verdict of a jury."

Thus, even if § 26 of the Bankruptcy Act were held applicable to railroad reorganization proceedings, it would seem that the proposed arbitration clause in the basic agreement would be partially in conflict with § 26(c), unless the bankruptcy court reserved the right to insure that arbitrators' awards were not given any greater effect than that contemplated by § 26(c).

Moreover, § 26 of the Bankruptcy Act was the only provision of the bankruptcy laws which authorized arbitration of disputes, and it was, and is, far from clear that § 26 is applicable in railroad reorganization cases. Section 77(1)

makes the non-railroad reorganization provisions of the Bankruptcy Act, including § 26, applicable to proceedings under § 77 only to the extent that they are "consistent with the provisions" of § 77 itself. And § 77(c)(2) vests in the reorganization court sweeping authority over, and responsibility for, the affairs of the debtor. An argument can be made that submitting disputes to arbitration in accordance with § 26 of the Bankruptcy Act would not be "consistent with" the allocation of authority contemplated by § 77(c)(2), and that therefore § 26 does not apply in railroad reorganization proceedings. Be that as it may, at the very least it seems clear that a reorganization court can best carry out its responsibilities under § 77(c)(2) by retaining some degree of control over the implementation of the end product of arbitration, especially where the magnitude and legal ramifications of an arbitration award cannot be perceived in advance.

For all of these reasons, I am satisfied that the condition included in Order No. 238 is entirely valid. But even if it were otherwise, the fact remains that the Trustees were authorized to enter into the Amtrak agreement only upon that condition. Amtrak, like any other party contracting with court-appointed trustees, can validly contract with them only to the extent authorized by the appointing court. I thus am unable to accept the suggestion that, somehow, Amtrak is free to ignore the provisions of Order No. 238.

In my view, Amtrak would be bound by the provisions of Order No. 238 even if it had been unaware of the condition imposed by the Court, until after the contract was executed. But no one can seriously suggest that Amtrak was not fully conversant with the terms of Order No. 238. The initial hearing on the Trustees' Petition for approval of the Amtrak contract commenced on April 20, 1971. In the course of that hearing, it was agreed that the cross-examination of certain witnesses would be deferred until a final hearing to be held three days later, on April 23, 1971. While Amtrak did not formally enter an appearance or participate as a party in these hearings, counsel for Amtrak, R. Chapman Rose, Esq., attended at least the April 20 hearing, and participated therein to the extent of making a brief argument in support of the Trustees' Petition

(Tr. pp. 1692-97). In the course of these hearings, particularly at the April 23 hearing, the arbitration provisions of the proposed contract came under heavy attack; indeed, many parties insisted that the type of condition ultimately inserted in Order No. 238 would provide insufficient protection. At the conclusion of the April 23 hearing, the Court sought information as to whether Amtrak had any objection to the proposed reservation relating to arbitration, and counsel for the Trustees advised that Amtrak had expressed no objection. The record does not disclose whether any representative of Amtrak was actually in attendance at the hearing on April 23. However, either that same day, or within two or three days thereafter, at the request of Amtrak's counsel, a conference in chambers was held, attended by Mr. Rose and other representatives of Amtrak, together with counsel for the Trustees. At that conference, Amtrak sought, unsuccessfully, to have the condition about arbitration removed from Order No. 238; and it was made clear that Amtrak would seriously consider the possibility of challenging that feature of the Order by means of an appeal therefrom. However, Order No. 238 was not appealed, by anyone.

B. Review Irrespective of Order No. 238.

Wholly apart from the provisions of Order No. 238, I find unacceptable the notion that a reorganization court is without jurisdiction to consider the propriety and feasibility of a proposal that the Trustees of the Debtor must forthwith embark upon a program of trackage rehabilitation involving potential expenditures (as to one small segment of the Debtor's property) of $11.5 million to $22 million. Irrespective of the provisions of Order No. 238, and even if the Rail Act had never been enacted, and the Trustees were still operating the railroad, the effect to be given in these reorganization proceedings to the conclusions of the arbitrators would have been a matter for determination by this Court. Section 77(c)(2) of the Bankruptcy Act provides that even the orders of governmental regulatory agencies requiring that certain work be done in order to protect the safety of the traveling public, are binding upon the Debtor's estate only if approved by the Court (or, under certain limited circumstances, the ICC);

surely mere contractual obligations are entitled to no greater weight.

C. The Indiana Judgment.

The arbitrators in Case No. 11 determined that the trackage in question was not being maintained so as to provide a level of utility commensurate with that existing as of May 1, 1971, and that under Paragraph 4.2 of the basic agreement, it was the responsibility of the Trustees to arrange for the upgrading, at no cost to Amtrak. In the course of the hearings before the arbitration panel, Amtrak expressly disclaimed any intention to seek damages for the alleged inadequate maintenance (an understandable concession, since (a) the possibility that Amtrak could prove that it had suffered damages was remote, and (b) under the operating agreement, if the Trustees had spent more on maintenance, the compensation due them from Amtrak would have been increased, at least to some extent). Amtrak sought only prospective relief, and the arbitrators' award was prospective only.

Moreover, the arbitrators' report expressly refused to resolve any issues concerning the effect of the Rail Act and the forthcoming conveyance to ConRail, stating

> "Accordingly, the Panel does not consider that it is the proper body to decide whether, or to what extent, the Regional Rail Reorganization Act of 1973 or the Final System Plan thereunder may affect the carrying out of this award."[3]

The judgment of the United States District Court for the Southern District of Indiana which was entered on March 24, 1976, confirming the award, was strictly limited to the provisions of the award itself. The judgment added nothing to the award, except finality. Essentially the only issues which could have been resolved in the confirmation proceeding were such matters as the integrity of the arbitrators, the absence of fraud or collusion, and the jurisdiction of the arbitrators, under the terms of the contract, to render the award.

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[3] The dissenting member was of the view that the award should not be entered at all, because the Rail Act made compliance impossible.

The judgment confirming the award is a final judgment, and is entitled to be given *res judicata* effect in these proceedings. No one has ever contended otherwise. In short, it is now finally settled that the Trustees had not fully complied with their obligation to maintain the trackage involved, and that Amtrak was entitled to have the situation speedily remedied. But the impact of the Rail Act upon effectuation of the award was clearly left open for later determination elsewhere.

It is only this judgment, entered on March 24, 1976, which has become final. If for no other reason than lack of finality, therefore, nothing which thereafter occurred in the Indiana court could give rise to the bar of *res judicata* or estoppel. *See, e.g., Kreiger v. General Electric Co.*, 497 F.2d 468, 472 (2d Cir. 1974), *cert. denied*, 419 U.S. 861 (1974). In the interests of completeness, however, it is appropriate to discuss briefly the "declaratory judgment" proceedings later held in that court.

A court which renders a judgment is ordinarily powerless to decide what effect is to be accorded that judgment in litigation before other courts. The Trustees have argued, and apparently are contending on appeal, that the "declaratory judgment" rendered by the Indiana court on June 5, 1976, was merely an advisory opinion, and therefore beyond the jurisdiction of that court, in the absence of an actual case or controversy. Since these issues are to be decided by the appropriate appellate court, I express no view as to the jurisdiction of the Indiana court in this regard. The views of the District Court in Indiana as to the effect which should be given to its earlier judgment, while not binding upon this Court, are nevertheless entitled to careful consideration.

But having carefully considered the views of the Indiana court, and notwithstanding my great respect for that tribunal, I find myself unable to agree with its conclusions.

In the first place, I cannot understand how an arbitrators' award which expressly left certain issues open for later determination by other tribunals can, by a confirmation judgment expressly limited to the terms of the award, be deemed to have resolved those very issues. In the second

place, I do not believe that issues of such magnitude and potential importance to the future of rail passenger service throughout a large segment of the nation should be deemed to have been resolved by a process of procedural sleight-of-hand, rather than on their merits. And finally, as will be discussed below, compliance with the arbitrators' award, as confirmed, is a legal and practical impossibility, and would plainly conflict with Congressional mandates.

I have therefore concluded that, in ruling upon Amtrak's petition in this proceeding, this Court must consider the effect of the Rail Act.

III

The basic agreement between Amtrak and the Trustees required the Trustees to maintain the trackage at its May 1, 1971 level of utility for a period of 25 years. But on April 1, 1976, as mandated by the Rail Act and the Final System Plan promulgated thereunder, the Trustees' ownership of the railroad and responsibilities for operating it became vested in ConRail. The suggestion that the Trustees nevertheless remain liable to maintain the property for all, or any part of, the remaining 20 years of the term of the agreement deserves serious consideration only if one assumes that Amtrak, unlike all of the thousands of other parties having legal relationships with the Penn Central, has been granted some kind of immunity from the impact of Congressional action. Needless to state, no such immunity has been conferred.

Congress plainly intended to eliminate the involvement of bankrupt estates and reorganization courts in the ownership and operation of the rail system in the northeastern part of the United States. By providing, in the Final System Plan approved by Congress, for the conveyance of ownership and operating responsibilities to ConRail as of April 1, 1976, Congress achieved that goal. The Final System Plan itself expressly deals with the question of ongoing maintenance and improvement of trackage to the level required by Amtrak (see Final System Plan Vol. 1, pp. 30, 43-44). To require the Trustees to plan for, finance, and carry out maintenance and improvements after the April 1 cutoff date would be clearly inconsistent with these

provisions, as well as with the provisions of § 211(h) of the Rail Act (governing the transitional financial arrangements between ConRail and the Trustees) and the valuation process now under way in the Special Court.[4]

The contract between the Trustees and Amtrak makes it abundantly clear that the question of maintenance and improvement is inseparable from continued ownership. The Trustees were required to maintain their own railroad, not someone else's. They were required to use their own employees (because of the terms of existing collective bargaining agreements), not someone else's. The contract purports to be binding upon the successors and assigns of the Trustees, without regard to whether such successor or assignee did or did not assume the obligations of the contract. Whether this means that Amtrak is entitled to enforce these obligations as against ConRail is not for this Court to decide. Depending upon how that question is ultimately resolved, it may be that Amtrak might be able to establish that implementation of the Rail Act has deprived it of valuable rights, for which it is entitled to a remedy; or ConRail might be able to establish that its assumption of these liabilities comes within the "other benefits" aspect of the valuation proceedings in the Special Court. I express no view as to any of these matters.

For the reasons thus far discussed, the relief sought by Amtrak in the present case cannot and will not be granted.[5]

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[4] For example, the Special Court is required to give consideration to "erosion" of the Debtor's estate stemming from pre-conveyance operations. If Amtrak's present contention were sound, such erosion would continue to pile up for the next 20 years. Moreover, the valuation of the properties themselves would be thrown into confusion.

[5] The entire question of upgrading trackage for passenger service (which requires, for comfortable, high-speed operation, better track conditions than is necessary for freight service) has received and is receiving the attention of Congress, the Department of Transportation, and the appropriate regulatory agencies. The ICC has recently completed a rulemaking proceeding, Ex Parte No. 277 (Sub. No. 2), *Adequacy of Intercity Rail Passenger Service-Track*, the report of which contains a thorough canvass of the field. 348 ICC Rpts. 518-80. Contrary to the implications of some of Amtrak's arguments in this case, the views expressed herein are entirely consistent with the views expressed by the Commission, which, at page 539, n. 4 states: "As of April 1, 1976, Penn Central ceased operations. It has been succeeded by Consolidated Rail Corporation (ConRail) in its former operations discussed herein."

IV

The procedures sought to be followed by Amtrak in nection with this entire matter have been such that, in aid of this Court's jurisdiction and to prevent undue interference with the reorganization process, an Order was earlier entered enjoining Amtrak from initiating or pursuing litigation on this subject in other jurisdictions, pending hearing and determination of the present petition. At a recent conference in chambers, it was apparent that, in the absence of that restriction, Amtrak intended to return to the Indiana court, or perhaps other courts, in an attempt to obtain a further expansion of the confirmed arbitrators' award, or perhaps in some other fashion to obtain "reparations." I do not profess to understand fully the legal theory or alleged basis for any such attempts, but I am persuaded that the injunction should remain in effect. If this Court's view of the matter is incorrect, it can be corrected on appeal; if correct, the injunction is proper.

Appendix E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1472

THE NATIONAL RAILROAD PASSENGER CORPORATION,
Plaintiff-Appellee,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Nos. IP76-76-C, IP74-420-C—**William E. Steckler,** *Judge.*

ARGUED OCTOBER 29, 1976—DECIDED MARCH 4, 1977

Before HASTINGS, *Senior Circuit Judge,** MOORE, *Senior Circuit Judge*** and SPRECHER, *Circuit Judge.*

SPRECHER, *Circuit Judge.* The sole issue on this appeal is whether there exist any grounds for vacating an arbitration award confirmed by the district court pursuant to 9 U.S.C. §§ 9, 13.

I

The Rail Passenger Service Act of 1970, 45 U.S.C. § 501 *et seq.* [hereinafter referred to as the "Amtrak Act" or the "Act"] authorized the creation of the National Railroad Passenger Corporation [hereinafter referred to as "Amtrak" or "NRPC"] for the purpose of providing intercity rail passenger service.

The Act authorized Amtrak to contract with railroads to relieve them of their responsibility for the provision

* Senior Circuit Judge John S. Hastings heard oral argument and participated in the conference of the court, but died before this opinion was submitted to him for approval.

** Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

of such service, 45 U.S.C. § 561(a)(1), and to obtain "the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree." 45 U.S.C. § 562(a). Amtrak and the Chesapeake and Ohio Railway Company [hereinafter referred to as "C&O"] entered into two contracts dated April 16, 1971: the National Railroad Passenger Corporation Agreement [hereinafter referred to as the "Basic Agreement"] and the National Railroad Passenger Corporation Arbitration Agreement [hereinafter referred to as the "Arbitration Agreement"].

Section 3.1 of the Basic Agreement, *Right to Services,* provides:

> Subject to and in accordance with the terms and conditions of this Agreement, Railroad hereby agrees to provide NRPC, over Rail Lines of Railroad, with the services requested by NRPC for or in connection with the operation of NRPC's Intercity Rail Passenger Service, including the carrying of mail and express on Intercity Rail Passenger Trains to the extent authorized by the Act. The initial services with respect to Railroad shall be as provided in Appendix B ....

Section 3.2 of the Basic Agreement, *Modification of the Services,* provides in pertinent part:

> NRPC shall have the right from time to time to request, and subject to and in accordance with the terms and conditions of this Agreement Railroad hereby agrees to provide, modified or additional services. Such requests shall be made by filing an amendment to Appendix B with Railroad on a date sufficiently in advance of the date upon which such amendment is to become effective to permit adequate joint planning and joint preparation for the modified or additional services provided for in such amendment.

Also, Article Six of the Basic Agreement, *Arbitration,* provides that "any claim or controversy between NRPC and Railroad concerning the interpretation, application, or implementation of this Agreement shall be submitted

to binding arbitration in accordance with the provisions of the Arbitration Agreement. . . ." Finally, Section 4.5 of the Arbitration Agreement provides that "the arbitrators shall, in reaching a decision, be governed by the provisions and language of the . . . Basic Agreement."

Pursuant to the Act, 45 U.S.C. §§ 521, 522, on January 28, 1971 the Secretary of Transportation designated a basic system within which intercity rail passenger service would be provided. Under the basic system, passenger trains were to be operated between Chicago and Cincinnati. The routes between these two mandatory service points over which Amtrak operated its trains until August 1, 1974 involved the use of Penn Central trackage. The initial services which C&O had agreed to provide Amtrak under Section 3.1 and Appendix B of the Basic Agreement did not include trackage for Amtrak's trains between Chicago and Cincinnati.

However, on August 1, 1974, the Federal Railroad Administration condemned as unsafe portions of the trackage along the Penn Central route and ordered that all passenger and freight service along the route be terminated on the morning of August 2, 1974. Thereupon, Amtrak filed a request under the Basic Agreement to have its trains between Chicago and Cincinnati operated over C&O trackage at the Basic Agreement rate for such services. C&O, however, contended that it was not required by the Basic Agreement to provide the requested service, and, therefore, the terms of the agreement, including its method of compensation, were inapplicable.

On August 2, 1974, Amtrak obtained a temporary restraining order requiring C&O to provide the requested service pending a preliminary injunction hearing. On August 22, 1974, following the hearing, the district court directed the parties to proceed with arbitration and, pending a decision by the arbitrators, issued a preliminary injunction requiring C&O to provide the requested service under the terms and methods of compensation in the Basic Agreement.

On November 7, 1974, the National Arbitration Panel, one member concurring in part and dissenting in part, filed its award. The decision provided in pertinent part:

1. The panel finds that "modified or additional" service under Section 3.2 of the NRPC Agreement includes service over the Rail Lines of the contracting railroad, whether or not such service is of the kind that has been characterized by . . . [C&O] as "expanded," "substituted," or "emergency" service.

2. The Panel finds that requests for "modified or additional" service under Section 3.2 of the NRPC Agreement must be made so as to allow appropriate time for joint planning of the requested service. The Panel finds that the request of the National Railroad Passenger Corporation (Amtrak) on August 1, 1974, did not allow time for proper planning as to a start-up on August 2, 1974, of service of the scope to be provided by Chessie, but did, in view of the consultations and trial run undertaken in the preceding months, allow for proper planning for a start-up of service as of September 1, 1974. The Panel concludes, therefore, that Amtrak is, and has been since September 1, 1974, entitled to the provision of the requested services in accordance with the terms of the NRPC Agreement. . . .

3. As to the period between August 1, 1974, and September 1, 1974, the Panel feels that, in view of the complex and confusing situation which developed, Chessie should be awarded greater compensation than that specified in the NRPC Agreement, and that such compensation should be at a rate equivalent to that of the Standard Detour Agreement.

On March 24, 1974, after a confirmation hearing, the district court confirmed the Panel's decision pursuant to Section 9 of the United States Arbitration Act, 9 U.S.C. § 9, and judgment was entered in accordance with 9 U.S.C. § 13. It is from this decision that C&O appeals.

II

We begin our inquiry with C&O's contention that the parties' contract, the Basic Agreement, rendered the instant trackage dispute nonarbitrable,[1] and therefore the district court's confirmation of that award must be vacated.

It is, as C&O argues, "well settled that arbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate." *Butler Products Co. v. Unistrut Corp.*, 367 F.2d 733, 735 (7th Cir. 1966) (citations omitted). However, in making a determination as to whether a particular dispute is subject to arbitration, "the courts have been assigned the limited role of 'ascertaining whether the party seeking arbitration is making a claim which on its face is one governed by the agreement.' " *Galt v. Libbey-Owens-Ford Glass Co.*, 376 F.2d 711, 714 (7th Cir. 1967) (citation omitted).

Moreover, our power in making even this limited determination is rigidly circumscribed. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (footnote omitted). *See also Carey v. General Electric Co.*, 315 F.2d 499 (2d Cir. 1963). The Supreme Court elaborated on the rationale underlying the limited role of the judiciary in the arbitral context in *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567-68 (1960) (footnotes omitted, emphasis added):

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. *Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's*

[1] In view of our disposition of this appeal, it is unnecessary to reach the issue, apparently raised by Amtrak in its brief to this court, that C&O waived all objections to the arbitrability of the trackage dispute.

> *judgment, when it was his judgment and all that it connotes that was bargained for.*
>
> *The courts, therefore, have no business weighing the merits of the grievance, considering whether . . . there is particular language in the written instrument which will support the claim.* The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.

Accordingly, where there is a broad arbitration clause covering all disputes involving the "interpretation, application, or interpretation" of a contract, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . ." *Warrior & Gulf, supra,* at 584-85; *Carey, supra,* at 505.

With these general principles in mind, we find that the trackage dispute between Amtrak and C&O comes within the ambit of the broad arbitration clause of the Basic Agreement. Amtrak contends that Section 3.2 of the Basic Agreement, *Modification of the Services, supra,* requires C&O to provide the requested service over C&O trackage between Chicago and Cincinnati. C&O contends that the requested service is not "modified or additional" service as contemplated by that section of the Basic Agreement. The arbitration clause provides that "any claim or controversy between NRPC and Railroad concerning the interpretation, application, or implementation" of the Basic Agreement shall be submitted to arbitration. In these circumstances, the Supreme Court has stated:

> The union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to "the meaning, interpretation and application" of the collective bargaining agreement. Arbitration should have been ordered. When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the . . . [arbitration clause], it usurps a function which . . . is entrusted to the arbitration tribunal.

American Manufacturing, supra, at 569.

Our conclusion on the question of the arbitrability of the instant trackage dispute under the Basic Agreement is supported by the Eighth Circuit's recent decision in *National Railroad Passenger Corp. v. Missouri Pacific Railroad Co.,* 501 F.2d 423 (8th Cir. 1974), interpreting the scope of an identical arbitration clause contained in a Basic Agreement between Amtrak and Missouri Pacific. Amtrak claimed that under the Basic Agreement Missouri Pacific was required, upon request, to provide services over the "Rail Lines" of Texas and Pacific, a 96.5% owned subsidiary of Missouri Pacific. Amtrak based its claim on the fact that the Basic Agreement defined "Rail Lines" to include all Missouri Pacific's "rights to use . . . [the trackage] of others." Missouri Pacific contended that a subsidiary's trackage was not covered by the Basic Agreement. The court found that the "dispute is one concerning the interpretation, application, or implementation of the Basic Agreement and is therefore arbitrable." Accordingly, the court held that it was error for the district court to resolve the merits of the dispute while purportedly making an arbitrability determination.

III

Similarly, it seems clear to this court that those objections predicated on the language and provisions of the Basic Agreement which C&O has raised as grounds for vacating the arbitral award are in fact directed not toward the arbitrability of the trackage dispute but rather to the merits of the award. In other words, C&O really objects to the interpretation of the Basic Agreement by the arbitrators in their decision and award.

C&O's claims of contract misconstruction may be briefly summarized.[2] C&O first contends that the service requested by Amtrak on August 1, 1974 was an emergency service and the language of Section 3.2 of the Basic Agreement, the section relied upon by the arbitrators, will not support

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[2] For the reasons set forth below, it is unnecessary to examine in detail C&O's arguments in support of its conclusions as to the proper interpretation of the pertinent contract provisions.

an interpretation which requires C&O to provide emergency services.[3] C&O next contends that under Section 3.2 it only had an obligation to provide "modified or additional" services over its "Rail Lines," and "Rail Lines," as contemplated by the parties' agreement, do not encompass *freight* trackage, such as the C&O trackage at issue in this case.[4] Since the arbitrators were to "be governed by the provisions and language of the . . . Basic Agreement," C&O concludes, the panel's misinterpretation of that agreement requires vacation of the arbitral award.

Even if we assume without deciding that C&O is correct in its assertion that the arbitration panel misconstrued the Basic Agreement, "it is settled that upon judicial review of an arbitrators' award 'the court's function in . . . vacating an arbitration award is severely limited,' . . . being confined to determining whether or not one of the grounds specified by 9 U.S.C. § 10 for vacation of an award exists." *Office of Supply, Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972) (citation and footnote omitted). Since C&O does not claim that the award was procured improperly or that the arbitrators were partial, corrupt or otherwise engaged in prejudicial misconduct, the only statutory ground upon which C&O's objections could plausibly be based is that "the arbitrators exceeded their powers." 9 U.S.C. § 10(d).

The courts are in agreement that arbitrators do not exceed their powers by misconstruing a contract. *See, e.g., Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 n.4 (1956); *Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960). It is true that some courts

[3] Specifically, C&O relied on the language in Section 3.2 which provides that requests for services under that section were to be made sufficiently in advance to permit joint planning and preparation for services requested. In this regard, the arbitrators concluded that the service requested was covered by Section 3.2, but that C&O was entitled to greater compensation for the first month of the service as a consequence of Amtrak's failure to make a timely request for services to begin on August 1, 1974.

[4] It is apparently undisputed that the trackage in question has been operated by C&O for freight traffic only since 1950.

have suggested that an arbitral award may be set aside if it is "completely irrational." *See, e.g., Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125 (3d Cir. 1972); *Marcy Lee Manufacturing Co. v. Cortley Fabrics Co.*, 354 F.2d 42, 43 (1965). However, a recent decision by the Second Circuit indicates that, assuming "irrationality" is a possible ground for vacating an award under the Federal Arbitration Act, its application will be reserved for truly extraordinary circumstances. In *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424 (2d Cir. 1974), the court concluded that, although in its judgment the arbitration panel's interpretation of the contract was "clearly erroneous," it was not "irrational" and therefore not subject to judicial revision.

Similarly, we believe that C&O's claims "reduce to the proposition that the arbitrators misconstrued the contract," *I/S Stavborg, supra*, at 431, and we find no basis for concluding that interpreting "modified or additional" services to include the service requested by Amtrak on August 1, 1974 or interpreting "Rail Lines" to include *all* C&O trackage is clearly erroneous, much less completely irrational.[5]

Hence, we hold that the alleged contract misconstruction —if it be that—is not a sufficient basis for vacating the panel's award.

IV

C&O's final contention is that the arbitration award should be vacated because it is not in accord with the Amtrak Act. C&O argues that under the Act Amtrak could have obtained the services at issue in this case in only two ways. Amtrak could have contracted for the operation of its trains over the C&O trackage pursuant to 45 U.S.C.

[5] In view of this conclusion, it is unnecessary for us to decide whether "irrationality" is a ground for vacating an arbitration award under the federal statute. We might note, however, that it is not difficult to see the problems courts might face in an attempt to distinguish serious misinterpretation from irrational construction. *Cf. I/S Stavborg, supra*, at 431. This problem would seem to be exacerbated by the fact that arbitrators are not required to give reasons for their awards. *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211 (2d Cir. 1972).

§ 562(a).[6] However, C&O contends that such a contract must incorporate the conditions of 45 U.S.C. § 563(a),[7] and the Basic Agreement contains no provisions paralleling the conditions of § 563(a). Since Amtrak failed to contract for the operation of its trains over C&O trackage between Chicago and Cincinnati in accordance with § 563(a), Amtrak was required by 45 U.S.C. § 562(c)[8] to go to the Interstate Commerce Commission to obtain what C&O characterizes as the emergency services requested by Amtrak on August 1, 1974. And, since the arbitration panel decided that Amtrak was entitled to the requested services under the Basic Agreement despite the fact that Amtrak failed to follow either of the two avenues for obtaining such services prescribed by the Act, the award must be vacated as in "manifest disregard of the law."

It is well settled that an arbitration award will not be vacated on the ground that the arbitrators misinterpreted applicable law. *Sobel, supra,* at 1214; *Office of Supply, Republic of Korea, supra,* at 379. Some courts have read the Supreme Court's decision in *Wilko v. Swan,* 346 U.S.

[6] 45 U.S.C. § 562(a) provides in pertinent part that Amtrak "may contract with railroads . . . for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree."

[7] 45 U.S.C. § 563(a) provides that Amtrak

> . . . may provide intercity rail passenger service in excess of that prescribed for the basic system, either within or outside the basic system, where [Amtrak], based on its own or available marketing studies or other similar reports or information, determines that experimental or expanded service would be justified, if consistent with prudent management. In determining the establishment of the additional routes, [Amtrak] shall take into account the current and the estimated future population and economic conditions of the points to be served, the adequacy of alternative modes of transportation available to those points, and the cost of adding the service. . . .

[8] 45 U.S.C. § 562(c) provides:

> To facilitate such operations by [Amtrak] as may be deemed by it to be necessary in an emergency, the Commission shall, upon application by [Amtrak], require a railroad to make immediately available tracks and other facilities for the duration of such emergency. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable including indemnification of the railroad by [Amtrak] against any casualty risk to which it may be exposed.

427 (1953), to permit vacation of an arbitration award which evidences a "manifest disregard" of applicable law.[9] However, even those courts which have adopted this view have concluded that "this judicially-created addition to . . . 9 U.S.C. § 10 is 'severely limited.'" *Office of Supply, Republic of Korea, supra,* at 380. It is instructive to note that the very language in *Wilko* which has been cited to support the existence of a "manifest disregard" ground for vacating an arbitration award reaffirms the longstanding rule that awards will not be set aside for errors in the interpretation of applicable law:

> Power to vacate an award is limited. While it *may* be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," *that failure would need to be made clearly to appear. In unrestricted submissions . . ., the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.*

Wilko, supra, at 436-37 (footnotes omitted; emphasis supplied).

Assuming without deciding that in an appropriate case an arbitration award may be vacated for a "manifest disregard" of applicable law, this is clearly not such a case. In essence, C&O is asking this court to vacate an award because the arbitrators did not accept C&O's interpretation of various provisions of the Amtrak Act and their

[9] We share the reservations recently expressed by the Second Circuit as to whether the *Wilko* dictum was actually intended to add "manifest disregard" of the law to the statutory grounds for vacating an award in 9 U.S.C. § 10. *I/S Stavborg, supra,* at 431. "How courts are to distinguish in the Supreme Court's phrase between 'erroneous interpretation' of a statute . . . and 'manifest disregard' of it, we do not know: one man's 'interpretation' may be another's 'disregard.'" *Id.* at 430 n.13. Moreover, since arbitrators have no obligation to state the rationale underlying their award, there may be no basis whatsoever for a court to determine whether they have manifestly disregarded the law or simply misinterpreted it. *See Sobel, supra,* at 1214.

effect on the trackage dispute. The statutory provisions relied on by C&O to support its contention that the arbitrators manifestly disregarded the law in making their award have apparently never been construed by the courts. In the absence of any authoritative construction to the contrary, it certainly would not have been unreasonable for the arbitrators to have concluded: (1) that § 562(a) authorized Amtrak to contract for the services in question;[10] and (2) that even if it is assumed that the services requested by Amtrak on August 1, 1974 are properly characterized as emergency services, § 562(c)[11] provides a non-exclusive means for obtaining such services and does not preclude contracting for the services in the Basic Agreement.

Hence, it is by no means clear what the "law" is which C&O claims was *manifestly* disregarded by the arbitrators. Whatever else the Supreme Court may have meant by its use of that concept in *Wilko*, we are convinced that it could not have meant that arbitration awards could be vacated because they are not in accord with the views of one of the submitting parties as to the proper construction of a statute which has never been authoritatively construed.[12]

Accordingly, we hold that there is no basis for vacating the arbitrators' award in this case on the ground that it evidences a manifest disregard of the law.

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[10] Section 562(a) authorizes Amtrak to "contract with railroads . . . for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree." There is nothing in § 562(a) to suggest that a contract executed pursuant to that section must incorporate conditions parallel to those contained in § 563(a), *supra*, note 7. Moreover, § 563(a) is subject to the interpretation that it only applies where Amtrak is seeking to provide additional service in excess of that provided for in the basic system. In the instant case, Amtrak requested services from C&O which would enable Amtrak not to expand railroad passenger service but rather to continue to provide basic system service between the two mandatory service points of Chicago and Cincinnati until the Penn Central trackage is once again safe for traffic. We wish to make clear that we are not adopting this construction as the proper one but only attempting to show that the C&O interpretation was not the only possible one.

[11] *See* note 8 *supra*.

[12] In light of our discussion of the "manifest disregard" issue, it is clear that C&O's contention that the award must be vacated because it compels a violation of the Amtrak Act must also be rejected.

For the reasons set forth in this opinion, the judgment of the district court confirming the arbitration award is affirmed.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit